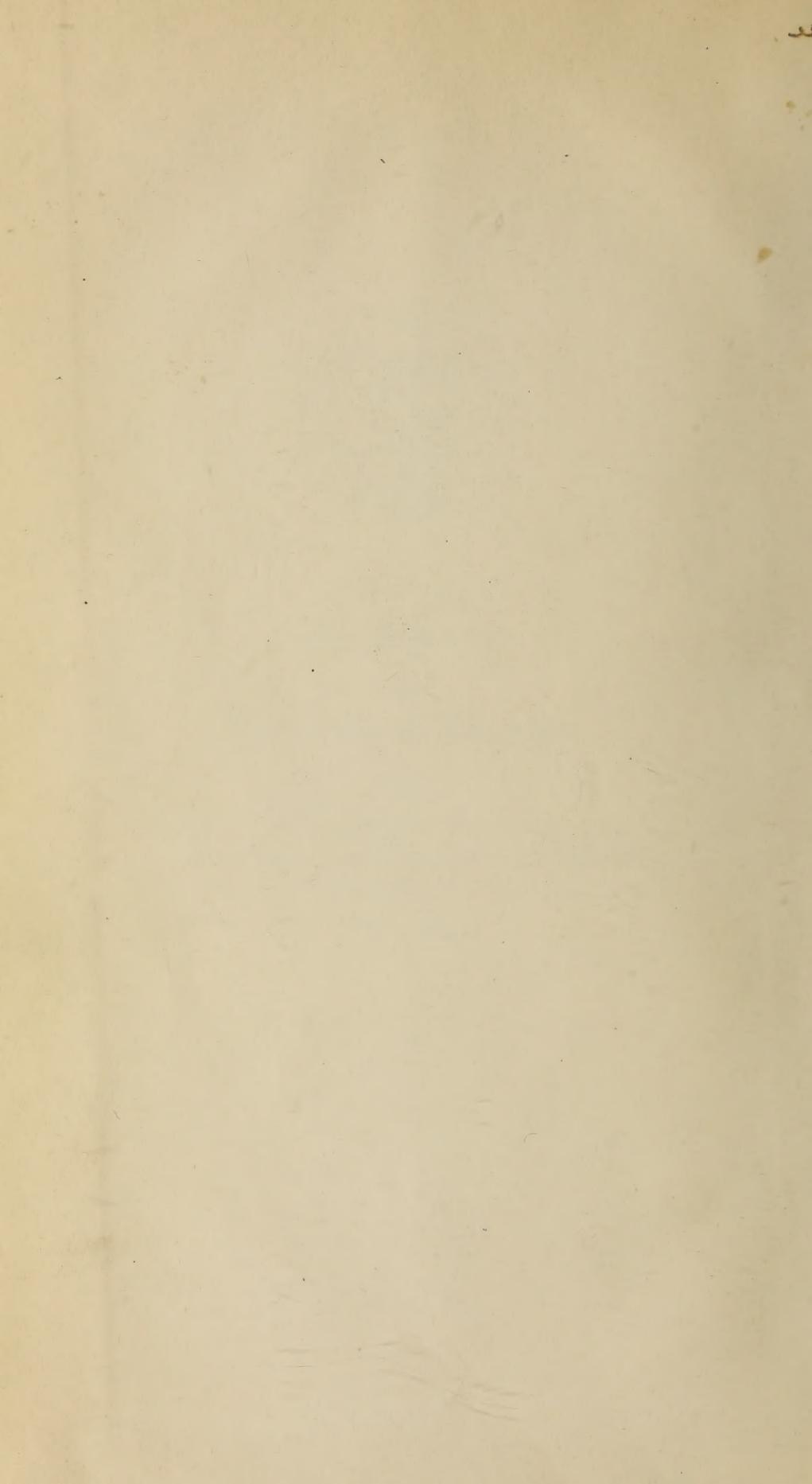


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QUEEN'S BENCH

AND

PRACTICE COURT

REPORTS.

BY

JOHN HILLYARD CAMERON, ESQ.

BARRISTER-AT-LAW, AND REPORTER TO THE COURT.

VOL. I.

CONTAINING THE CASES DETERMINED FROM
EASTER TERM, 7 VICTORIA, TO EASTER TERM, 8 VICTORIA, INCLUSIVE ;
AND SOME CASES OF AN EARLIER DATE :
WITH A TABLE OF THE NAMES OF CASES ARGUED,
AND DIGEST OF THE PRINCIPAL MATTERS.

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1845.

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III

JUDGES

OF

THE COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS:

THE HON. JOHN BEVERLEY ROBINSON, C. J.
" JAMES BUCHANAN MACAULAY,
" JONAS JONES,
" ARCHIBALD MCLEAN,
" CHRISTOPHER A. HAGEMAN.

Attorney-General:
WILLIAM HENRY DRAPER.

Solicitor-General:
HENRY SHERWOOD.

A

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REPORTS OF CASES
IN THE
QUEEN'S BENCH AND PRACTICE COURTS.
Easter Term, 7 Victoria.

BANK OF BRITISH NORTH AMERICA *v.* CLARKE.

The statute 7 Vic., ch. 31, abolishing imprisonment in execution for debt, deprives a plaintiff of the power of arrest in execution, as well in cases carried to judgment before, as since the passing of the act.

Crooks moved for a rule to issue a writ of capias ad satisfaciendum on an affidavit made before a judge of the Court of Queen's Bench in Lower Canada. It appeared, that the plaintiffs had entered final judgment before the passing of 7 Vic. ch. 31, abolishing arrest in execution, was passed; and *Crooks* now contended, that that statute did not apply to suits which had been commenced before the act was passed, as by the first clause (*a*) the power of taking or charging a defendant in execution was taken away only in such actions as are specified in the prior part of the clause, and could therefore be applied to no other actions than those which were commenced after the passing of the act.

ROBINSON, C. J.—We cannot grant the rule. It was the evident intention of the legislature to prevent arrest in execution in all cases after the passing of the act; there is no saving of existing suits, and the plaintiffs must therefore be confined to their execution against the property of the defendant.

MACAULAY, J., JONES, J., and McLEAN, J., concurred.

Rule refused.

BRUCE *v.* SCHOLFIELD.

A defendant cannot be arrested since the statute 7 Vic., ch. 31, on a writ issued before the act was passed, on an affidavit in the form required by the old law.

Adam Wilson had obtained a rule nisi to set aside the arrest of the defendant on affidavits, shewing that he had been arrested since the passing of the act 7 Vic. ch. 31, on a writ issued on an affidavit in the form used before that act was passed.

Crooks shewed cause. The affidavit was made and writ issued before the act was passed, and the arrest must therefore be good. It is true,

(*a*) *Ante*, page 8.

that the words of the statute are positive; but it can never have been intended that it should be applied to proceedings commenced before it became a law, as the writ might be executed before the plaintiff could have an opportunity of countering it, and he would be made a trespasser without any default of his own.

ROBINSON, C. J.—The terms of the act positively prohibit arrest for debt on mesne process, except in the cases and on the form of affidavit mentioned in the first clause. We cannot extend the meaning of the words, and the arrest must be set aside, but without costs, and on the terms of no action being brought by the defendant.

MACAULAY, J., JONES, J., and McLEAN, J., concurred.

Rule accordingly.

GARRISON v. BALKWELL *et al.*

A party applying for his discharge from custody on an attachment under 7 Vic. ch. 31, sec. 8, must shew that he is in contempt for non-payment of money, and the notice of his intention to move for his discharge must be served on the opposite party, and not on his attorney.

J. H. Cameron had obtained a rule nisi to discharge the plaintiff from the custody of the sheriff of the London District, under 7 Vic., ch. 31, sec. 8, he being a prisoner on the limits on an attachment, and having given notice to the defendant of his intention to apply for his discharge under that section, and no interrogatories having been exhibited to him by the defendants.

John Duggan shewed cause. The affidavits do not shew that the plaintiff is in contempt for the non-payment of money, and relief cannot therefore be afforded him; besides the notice is to the attorney, and not to the defendants, and as the statute requires notice of the intended application to be given to the *party*, notice served on the *attorney* is insufficient. The plaintiff moreover is not in close custody, and the benefit of the act must have been intended only for parties who were in prison, not for those who were on the limits.

ROBINSON, C. J.—The notice should be given to the party suing out the attachment, not to his attorney; and the affidavit should state, that the contempt for which the plaintiff has been attached, was for non-payment of money. Here the affidavit shews merely, that he is in custody for a contempt, and as the statute only applies where the contempt has been incurred by the non-payment of money or costs, the case is not brought clearly within the act, and the rule must be discharged.

MACAULAY, J., JONES, J., and McLEAN, J., concurred.

Rule discharged with costs.

Doe dem. MASON v. BALLARD *et al.*

In ejectment by a mortgagee, his mortgagor is a good witness to prove the mortgage void for usury, if the defendant or tenant does not hold under him.

EJECTMENT ON A MORTGAGE IN FEE.—The plaintiff produced and proved a mortgage executed by William Ballard to him, to secure £37 10s. payable in February 1842, but gave no evidence of the mortgagor's title, and shewed no privity between him and the defendant. The defendant's

counsel not objecting to any defect in the plaintiff's case, called the mortgagor to prove the mortgage void for usury, but the learned judge thinking him incompetent to avoid his own deed, rejected him, and the plaintiff had a verdict.

John Duggan obtained a rule nisi to set aside the verdict for misdirection, and for the rejection of proper evidence, and cited Doe dem. Springstead *v.* Hopkins. (*a*)

Gamble shewed cause.

ROBINSON, C. J.—We are of opinion that the rule must be made absolute on the authority of the case cited, in which it was held in accordance with modern authorities, that the evidence was receivable, contrary as I think to sounder and more reasonable opinions, which had formerly prevailed (*b*). The point seems now well settled in England by a series of decisions binding upon us, and we cannot go back to the doctrine of earlier times, at this period, when the tendency is rather to open the door wider to the reception of evidence. Had the defendants been in possession under this witness, his testimony would not have been receivable, because the direct effect of the verdict would be to confirm his own possession through his tenant or servant, but this was not made a point, either at the trial or on the argument. The case was but imperfectly proved on the part of the plaintiff, and there must be a new trial, with costs to abide the event.

MACAULAY, J., JONES, J., and McLEAN, J., concurred.

Rule absolute accordingly.

In re petition of EASTWOOD and Others for partition.

The court cannot award a writ of partition under 2 Will. IV., ch. 35, where all the parties interested in the partition consent to its being made.

Small, Q. C., moved for a writ of partition under 2 Will. IV., ch. 35, on a petition by which it appeared that all the parties interested in the partition were willing that it should be made, and named three freeholders to make it.

ROBINSON, C. J.—We cannot award the writ, as the parties declare themselves willing to make the partition, and the fifth section of the act then points out the course they are to pursue. The interference of the court is only contemplated where there is an adversary proceeding.

MACAULAY, J., JONES, J., and McLEAN, J., concurred.

Rule refused.

Doe dem. HILL v. GANDER.

Where A. and B. were the proprietors of adjoining lots, and B. had encroached for more than twenty years upon a part of A.'s land which was cleared, and B.'s fence which enclosed the encroached land, would if protracted, have included also a portion of A.'s woodland, which had never been fenced, it was held, that B.'s adverse possession of the fenced land, could not be extended to the woodland, which his fence, if protracted, would have enclosed.

EJECTMENT FOR LOT NO. 2, 7 CONCESSION, PELHAM.—It was proved at the trial, that the proprietor of Lot 1 had for more than twenty years

(*a*) Queen's Bench, U. C., Trin. Term. 7 Will. IV.

(*b*) Peake's N. P. C. 117.

possessed according to a fence, which was not straight, and which he had placed as a division line between Lots 1 and 2, but which ran only part of the way back upon the lot. The fence was an encroachment on Lot 1, and the back part of the lot not included in it, was still woodland, and not in the actual occupation of either party. The plaintiff's counsel at the trial contended that B.'s adverse possession could not be extended to the rear part of the lot, or to any part of it, which the fence did not actually include, while for the defendant it was urged that the adverse possession included all such parts of the lot, as the fence, if protracted, would include. The learned judge however considered, that the adverse possession was confined to the part fenced in, and the plaintiff had a verdict with leave to the defendant to move to enter a nonsuit upon that point.

Gwynne having accordingly obtained a rule nisi,

J. H. Cameron shewed cause. The adverse possession could not be extended to the land in question, as that would be giving an effect to the statute of limitations, which would work the greatest injustice. It could not be successfully contended that there was an adverse possession of land, which was quite as much in the possession of the plaintiff as the defendant. It was sufficient that the plaintiff should have his right barred in the land on which the encroachment had been made out, and which had never been in the defendant's possession, unless placed in it by the existence of an imaginary line. Besides this point had been already decided by the court in *Chesley v. McDonald* (*a*), and the right was clearly with the plaintiff.

Gwynne in reply. The plaintiff could not recover. If the defendant was entitled to hold any part of the land claimed by the plaintiff, by adverse possession, he was entitled to hold the whole of it. The defendant's possession could not be restricted to the part within the fence, but must be extended constructively to all the land that the fence, if protracted, would enclose.

ROBINSON, C. J.—We think that the plaintiff is entitled to recover for the woodland. It would not be reasonable to carry into effect the statute of limitations, in the spirit, which is contended for by the defendant. When the owners of these adjoining lots took possession of their respective lands, there is no doubt that neither of them meant to do wrong to the other, by occupying any land not covered by his own deed. They took possession believing that they had placed their boundary fence on the true line. If meaning to be correct they fell into an error, and that error was unfortunately not discovered for more than twenty years, it will be sufficiently hard that by the effect of the statute of limitations, the rightful owner should lose such part of his land, as he has ignorantly suffered the other to occupy for so long a period; but the hardship would be much greater, if he must also lose so much as would be included within a line protracted from the boundary fence through the unoccupied land. As to the legal principle; the point is not a new one, we had it expressly before us in *Chesley v. McDonald*, and I think incidentally in other cases, and we have decided that the party having the title, loses only that of which he has been actually dispossessed. I find the point has (as might have

been expected) come frequently into discussion in the American courts (*a*) and in one case the true principle is thus clearly expressed. "There would appear to be no clearer principle of reason and justice than this, that if the rightful owner is in the actual occupancy of a part of his land by himself or his tenant, he is in the constructive and legal possession and seizin of the whole, unless he is disseized by actual occupation and dispossessio[n]. If this were not the law, the possessor by wrong would be more favored than the rightful possessor. There are two, each in actual possession and occupation of part of a surveyed tract, the owner and an intruder. Who then is in the possession of the part not occupied by enclosure by either? The man who has no right but by disseizin of a part, or he who is in the actual occupancy of a part, and the rightful owner of the whole? In this kind of mixed constructive possession, the legal seizin is according to the title. Title draws possession to the owner. It remains until he is dispossessed, and then no farther than actual dispossession by a trespasser, who cannot acquire a constructive possession, which always remains with the title." This is the principle upon which we are deciding, expressed with great precision and clearness. In another case (*b*) the language of the court is, "when surveys interfere, the act of limitations has no operation against him who has the best right, unless his opponent takes an adverse and exclusive possession; when there is no interference, possession of part is possession of the whole." I do not cite these dicta as decisions binding upon us, but it is satisfactory to find these expositions of the principle in question by eminent judges, though of a foreign country, founded as we know they are in their judgment, upon the common law of England, and bearing upon questions, which from the nature of things are much less frequently called up in England than in America, and upon which therefore it is not always easy to find adjudications in our books.

MACAULAY, J., JONES, J., and McLEAN, J., concurred.

Rule discharged.

Rose *et al. v.* Cook.

Where the defendant moved to deprive the plaintiff of costs for a vexatious arrest, under 49 Geo. III., ch. 4, the difference between the amount recovered and that sworn to being only £7, and in his affidavits a wrong christian name was given to one of the plaintiffs in the style of the cause, the court refused to allow them to be amended, and discharged the rule.

J. H. Cameron moved rule absolute to deprive the plaintiff of costs for a vexatious arrest under 49 Geo. III., ch. 4, on affidavits shewing that the plaintiff had arrested for £130, and recovered only £123.

Vankoughnet shewed cause, and took a preliminary objection to the affidavit, that the name of one of the plaintiffs in the affidavit was *John*, whereas the proper name was *Jesse*.

Cameron asked for leave to file amended affidavits. It had been decided in the Practice Court by Macaulay, J., in a similar case, (*c*) that

(*a*) Adam's Eject. American Edition, Notes to pages 53, 54.

(*b*) 2 Serj. *v.* Rall, 436.

(*c*) Ball *v.* McKenzie. Trin. Term. 1843.

the defendant might amend his affidavits, and here, he considered, the defendant was entitled to the same indulgence.

ROBINSON, C. J.—The objection, we think, ought generally to prevail on a motion of this kind, and we cannot allow the matter to stand over for amended affidavits. Were the case plainer and stronger, we might grant the indulgence.

MACAULAY, J., JONES, J., and McLEAN, J., concurred.

Rule discharged.

COUNTER *et al.* v. HAMILTON.

After judgment on demurrer, an amendment will not be allowed unless under very special circumstances, and the motion must be promptly made.

This was an action of covenant, in which the plaintiffs assigned several breaches, and the defendant having pleaded specially to two of them, the plaintiffs demurred, and in Michaelmas Term last, the court gave judgment for the plaintiffs on the demurrer to the first plea, and for the defendant on the second. When the judgment was given the defendant moved for and obtained leave to amend his plea, but the plaintiffs' counsel, although present in court, made no motion to withdraw his demurrer to the plea decided against him, either at that time or during the term; but on the 15th of September following, the plaintiff obtained a summons from the Chief Justice in chambers to withdraw his demurrer, but produced no affidavit of merits, and refused to consent to a change of venue from the Midland District, where the defendant considered that he was not sure of an impartial trial, as there were many persons in the district who were either stockholders in the steamer, which was the subject of the action, or were the connections of stockholders, the defendant offering to allow the demurrer to be withdrawn if the venue were changed. The summons was discharged, because the application was so late, and the plaintiffs did not produce any affidavit of merits. No motion was made in Hilary Term. *Blake* now obtained a rule nisi to withdraw the demurrer, on an affidavit of the plaintiffs' attorney, stating that he had had the principal management of the cause, and is aware of the evidence which the plaintiffs can produce at the trial; that he is advised and believes, that if they are allowed to reply to the plea demurred to, they will be able to prove gross negligence on the part of some or one of the persons navigating the steamer, whose loss is the subject of this action, and that but for such negligence, she would in all probability not have been lost on the occasion in question.

Sherwood, Q. C., and Boulton, Q. C., shewed cause, and produced affidavits shewing that the rules for judgment on demurrer had been taken out and served on the plaintiffs' attorney immediately after Michaelmas Term, and that the defendant had taxed and paid the costs of his amended plea, and that the plaintiffs had afterwards served and countermanded notice of trial. The plaintiffs are not entitled to succeed; they have put themselves upon the law of the case, and after that has been decided against them, they cannot now come forward and say, that they have a good defence upon the facts. It is a principle that has been frequently adverted to in the English courts, and there parties have been

strictly held to whichever line of defence they may have taken. The application, too, is altogether too late. *Bramah v. Roberts* (*a*) is in point.

Blake in reply (*Burns* and *Foster* were with him).—The indulgence ought to be granted, more especially as the defendant has been allowed a similar favour. This court has never strictly followed the practice in England in refusing amendments after demurrer, and it has been constantly taken for granted, that if a party had an apparently good ground of demurrer, that he might demur without incurring any risk of an amendment being refused, if the demurrer were decided against him. The case of *Breakenridge v. King*, in this court, (*b*) was a stronger case than this; there an amendment was allowed after the plaintiff had actually assessed contingent damages on the demurrer, and a great injustice may be suffered by the plaintiffs if it is refused here.

ROBINSON, C. J.—The propriety of making this rule absolute is rather to be decided by my brothers than myself, as I have already given my opinion upon the application to amend, made to me in chambers. I am not aware that this court has gone so far in amending as we must go in this case, if the plaintiffs' motion be acceded to; and if we had done so under the pressure of a strong feeling of justice or necessity in some particular case, we should first have to compare that case with the present, in order to see whether the one did really form an argument for the other; and if it did, then it would be incumbent on us to examine, whether we had in the former case gone beyond the bounds of authority and precedent in England, for if we had, it would become a question in a case where the amendment is strenuously opposed, as it is here, whether we ought not to bring back our practice within the limits of English authority, to which it is certainly highly convenient, if not in all cases necessary, that we should endeavour to conform. The case in our own court, which has been pressed upon us, as the strongest in favour of the amendment, is that of *Breakenridge v. King*, Trinity Term, 1835; I have looked at my note of that judgment, and found the case, as I apprehended, very far short of the present. The principle of amendment after demurrer received then the best consideration we could give to it, and most of the cases were cited. So far the judgment may be worth referring to; but the facts of the two cases are so dissimilar, that the one cannot serve as an authority for the other. In *Breakenridge v. King* the plaintiff was moving to withdraw his demurrer to the defendant's pleas and reply to them, so far the application was of the same nature, but the court were applied to directly upon pronouncing their judgment, as in *Carr v. Hinchcliffe*. (*c*) We have never been particular in this court, in holding the party to move before the judgment is pronounced, that is either before or during the argument, or at least before the court have declared their judgment, but have usually granted leave as freely at the conclusion of the judgment as we should have done before. In this respect, though we have deviated from the usual course of the English practice, we are not without abundant instances of English cases to warrant us; and it is clear, that as the whole term is regarded, for many purposes, as one sitting, and the judgments given during the term are within the control of the court during the whole term, so that they may alter or rescind them,

(*a*) 1 Bing, N. C., 481. (*b*) Trin. Term, 1835. (*c*) 5 B. & C. 547.

as they may choose, it can therefore only be a matter of discretion upon grounds of convenience, whether they will hold the parties to move before judgment concluded, or will allow them to move immediately after. There can be no real difficulty in the way, either substantial or technical. In *Breakenridge v. King*, the main point for consideration (which does not come up in this case) was, that the plaintiff had taken the cause down to the assizes and assessed contingent damages. This, it was contended, created an insuperable bar to amending upon the demurrer being subsequently argued, and it was to that supposed difficulty that we applied ourselves. We found it, as we thought, no insuperable bar, either in reason or English authorities, though upon authorities the case is not so entirely free from doubt as could be wished. That question does not apply in the case before us. In this respect *Breakenridge v. King* is in point, that the plaintiff there having, as he shewed, an answer which might be given to the defendant's plea upon the fact, ventured to demur, and trust himself to the law of the defence, admitting the facts; and when the law was found against him, then he desired to fall back upon the answer which he had it in his power to give to the facts, though he had waived it. It is quite clear, that this is an indulgence very rarely extended to a party in England, and indeed it is an indulgence, very different in its nature from the application to amend a pleading, which is merely formally defective. The case of *Bramah v. Roberts* (a) states in terms as strong as could be used, that it is the practice in England to refuse amendments of the first description. The principle is a reasonable one, and I have no doubt it is wise and necessary to adhere to it, as a general rule, though perhaps not as a rule to which no exception can, under any state of facts, be admitted. Now that the late rules of pleading compel a defendant for the plaintiff's convenience to plead almost every defence specially; if the plaintiff, when he knows that he can successfully disprove the defendant's alledged facts, will either torment him by excepting to the form of his plea, or will unnecessarily bring the matter to a doubtful legal issue, when he has a good case upon the merits, it is highly expedient and salutary to check that course of proceeding, by impressing upon parties, that they take that course at the peril of being held to abide by the result of the demurrer, and that they will not be permitted to shift their plan of meeting the defendant's case, when they find the law is against them. In this case it seemed to me, when I was applied to in chambers, that if the plaintiff had moved when judgment was given, he ought to have shewn a clear *primâ facie* case upon the merits, such as, if proved, might repel the defendant's plea. Instead of that, he produced no affidavit of merits whatever, nor does he now, indeed, sufficiently supply that want. Then, instead of moving during the argument or immediately after judgment, he makes no application to amend until the vacation; and then, being refused, he allows another term to elapse, and makes his motion now in the second term after that in which judgment was pronounced. We do not undertake to determine on this occasion, what we could do without violating any legal principle in such a case, after the term in which judgment has been given, upon a clear shewing of a good case upon the facts, not abandoned without reason, and where, as in

(a) 1 Bing, N. C., 481.

Breakenridge v. King, the judgment on demurrer would have finally bound a continuing right, or where the party moves on a discovery of new facts. But upon this case, as it stands, I am of opinion that the amendment should not be made, considering what passed at chambers, the time that has elapsed, and the affidavits that have been produced.

MACAULAY, J., JONES, J., and McLEAN, J., concurred.

Rule discharged.

BELL v. LEY.

A defendant who has been charged in execution since the passing of the act 7 Vic., ch. 31, on a judgment obtained before the act, is entitled to be discharged from custody.

Adam Wilson shewed cause against a rule nisi to discharge the defendant from custody. It appeared that the action was commenced before the late act 7 Vic., ch. 31, and in the month of November before the act was passed, the defendant was rendered in discharge of his bail, but was not charged in execution until after the act was passed, which the defendant contended he could not be under the new act. The act, *Wilson* contended, did not apply to suits commenced before it came into operation, so as to prevent the issuing of execution, as the words in the latter part of the first clause, which are applicable to executions, are confined to such actions as are mentioned in the first part of the clause, and cannot be intended to apply to actions commenced before the act was passed.

Bell in reply. The terms of the act make no exception in favor of suits commenced before its passing, and the intention being to abolish arrest in execution, its provisions should be construed liberally, and cannot be restricted to future suits.

—*ROBINSON, C. J.*—We have already this term refused to allow a ca. sa. to be issued, where it was necessary to apply for the intervention of the court (*a*) on a judgment obtained before the act, and we are now on a similar judgment, asked to discharge a defendant from custody who has been charged in execution since the act, after being rendered by his bail before it was passed. Considering the nature of the enactment, there are two principles in the construction of statutes, which bear upon it in opposite directions. On the one hand, we ought not to give a statute an ex post facto operation, injurious to the rights of parties, by any latitude of construction. On the other hand, a statute passed in favor of liberty, and with the avowed purpose of mitigating the pre-existing law, ought to receive a favorable, that is, a benign construction. The fair effect of these opposing maxims perhaps is, that they neutralize each other, and make it our duty simply to go as far as we conscientiously believe the act goes, neither stopping short of it, nor going beyond it, by assuming the right to construe it in any degree favorable to either party. The question concerns only the first clause. The title of the act is “An act to abolish imprisonment in execution for debt, and for other purposes therein mentioned.”—It is not called an act to abolish “after a certain time,” or in actions “to be hereafter brought,” but to abolish (for all that the title imports) at once and absolutely. Then the preamble decries imprisonment for debt,

(a) *Bank B. N. A. v. Clarke*, ante page 1.

where there has been no fraud, as "demoralizing in its tendency," "detrimental to the interest of the creditor," and inconsistent with a humane and christian spirit. Now it can hardly be supposed that the imprisonment can be beneficial to the debtor, and as it is described in the preamble to "be detrimental to the creditor," it is not unreasonable to suppose that the legislature did mean to abolish at once a process of imprisonment, which was detrimental to both parties, and contrary to humanity and christian feeling, I mean of course in cases not fraudulent, which we must assume this and every other case to be, until the contrary is shewn. Then the first clause provides thus : "that from and after the passing of this act, no person shall be arrested or held to bail, upon any cause of action arising in any foreign country where the defendant would not have been liable to have been arrested or held to bail, had such defendant continued within the jurisdiction of the courts of such foreign country, or in any civil suit where the cause of action shall not amount to ten pounds of lawful money of this province ; and where the cause of action shall amount to ten pounds and upwards, it shall not be lawful for the plaintiff to proceed to arrest the body of the defendant or defendants, unless an affidavit be first made by such plaintiff, his servant or agent, of such cause of action, and the amount justly and truly due to the said plaintiff from the said defendant, and also that such plaintiff, his servant or agent, hath good reason to believe, and doth verily believe that the defendant is immediately about to leave the Province of Canada, with intent and design to defraud the plaintiff of the said debt ; *and that no person shall be taken or charged in execution in any such action for any sum whatever, whether the party shall originally have been held to bail, or been merely served with common process.*" It is upon the last few lines of this clause that this question turns. Have we authority to read after the word "action," the words "hereafter to be brought," or any other words equivalent in sense, and thus hold that the case of this defendant does not come within the prohibition. Let us suppose with reference to the first part of this clause, which is all one sentence, that in any action which had been commenced by non-bailable process, before the act was passed, the plaintiff desired to arrest the defendant under 2 Geo. IV., ch. 1. on an alias writ, but that the cause of action was for a debt contracted in a foreign country, where there was no authority to arrest, or that it was for a debt under £10, or that he could not make an affidavit in the new form prescribed in this clause, could he now in the face of this provision, in any such case have arrested the defendant on mesne process? I think clearly not, for the clause says as plainly as words can speak "that from and after the *passing of this act*, no person shall be arrested, &c.," without any saving of actions already pending. But the words "from and after the passing of this act," apply to and control the whole sentence, and we must consider them as expressly restrictive of arrest in execution, as in mesne process, unless we can find something coming after them, to restrain their sense. Then we must ask ourselves what is meant by the words "in any such action," which do immediately follow? Plainly they mean, I think, in any such description of action as has before been specified : "such" is clearly in this place a word of reference, and the actions are described in the former part of the clause, or in other words, in no action whatever shall the defendant after the act "be taken

"in execution," though in the case of debts above £10, when the plaintiff will make an affidavit in the new form, he may be held to bail. And when the sentence concludes with these words "whether the party shall originally have been held to bail, or merely served with common process," I certainly do not see any room for an argument. Can we say then, that this defendant has not been charged in execution contrary to that statute. If we can, it must be solely by attributing to that one word "such," a meaning which I do not see belongs to it. No allusion had been made in the earlier part of the clause to actions already pending. The legislature give evidence throughout the act, that they either inadvertently or by design omitted to give any particular consideration, to what may be called the vested rights of plaintiffs, who had already proceeded in their actions, and were in the middle of their remedy; nor do they seem to have reflected upon the possible inconvenience, that might be produced in some circumstances by interfering with them. Then if no allusion is made to actions before brought, how can we hold that the words "such action" are to be confined in their sense to actions already brought. I have looked carefully into the 7th, 8th, and 9th clauses, to see if they would supply the plaintiff's construction, but they do not. There is an embarrassment in this case from the circumstance, that the debtor has been surrendered by his bail, and a ca. sa. was necessary for charging him in execution or he would have been superseded, as he must be now, if not charged within the proper time, or rather at once, if he never can be so charged. This leaves the plaintiff in a helpless state, but not more so than the plaintiffs in other cases, where the defendant has given bail before the act was passed, for in those cases the new proceeding by interrogatories and commitment in the discretion of the court, is not applicable. It is undoubtedly a principle in the construction of statutes, that they shall receive a reasonable interpretation, that is, so as to make their operation reasonable, if that be possible, and therefore wherever the effect, which is sought to be ascribed to a statute, would be unjust or unreasonable, we should not give the statute that effect unless the language and intention be too plain to admit of doubt, in which case they must of course prevail. Now it certainly is unreasonable to suppose that the legislature meant to leave that class of creditors, who had commenced their actions, without any remedy against the person of their debtor, while they mean clearly to admit such a remedy, though in a very much altered and restricted shape, in actions to be thereafter brought. Then are we to infer on account of this obvious incongruity, that the legislature meant not to interfere with actions pending, but let them proceed to the end of execution under the old law; or are we rather driven to admit that the legislature has by accident omitted to provide specially for the cases of actions pending, but nevertheless has by language too plain to admit of a doubt, and too express to be evaded, prohibited the taking any one in execution on a civil judgment after the passing of the act. We should incline certainly to give the statute a sensible construction, and such as may prevent a failure of justice, but it becomes a nice question, when in order to overcome an apparent difficulty, we are required to authorize the imprisonment of a party against the express provisions of an act of parliament. We have dwelt much upon the language of this clause, and do not find that we can support the issuing of a ca. sa. against the

body in any case since the passing of the act, by any construction which we can venture to give to it. I shall go again through the clause in order to explain, if I can clearly, the view which can alone, in my opinion, be taken of it. Leave out the word "such," and the enactment would be this, "that from and after the passing of this act, no person shall be taken in execution in any action for any sum whatever, whether the party shall originally have been held to bail, or been merely served with common process." Could the defendant in this action have been now taken in execution, in the face of such an enactment? I think not. Then if he could not have been, it must follow that all we have to consider is the force which should be given to the word "such" as here used. It can only be understood as referring to actions that had been before spoken of in the clause. "Any such action." Now what actions had before been mentioned? not actions that *had been* brought, or that were *to be* brought, for no such distinction is taken, but actions upon a demand arising in a foreign country, where the defendant could not by law have been arrested; actions for debts under ten pounds, and actions for debts over ten pounds. It is not pretended that this is an action of the first class mentioned, we see that it is not one of the second. It is, as we must assume, an action of the common kind for a debt over £10. Now if this action had been commenced by non bailable process and was pending when the act was passed, and if the plaintiff had desired to arrest the defendant, and hold him to bail, after the act was passed, could he have done so? I think certainly not without making an affidavit in the new form prescribed by the act. If so, then we can have no authority for holding that the statute was intended only to apply to actions, which should be commenced after its passing. And suppose having made the new affidavit, and arrested and held the defendant to bail, the plaintiff should after judgment have been desirous to charge him in execution, what could we say, but that he desired to take the defendant in execution in one of such actions as the statute had described, namely, an action for a debt over £10, in which he had arrested the party upon a new affidavit, as the statute directs; and yet the moment that we admit this, we shall be forced to confess that the statute will not allow it, for it says expressly, "that no person shall be taken or charged in execution *in any such action*, for *any sum* whatever, whether the party shall *originally have been held to bail* or merely been served with common process," and clearly this would be one of such actions. I must say, looking over the whole act, that I really have no doubt upon my mind that the legislature did intend that from the moment of its passing, there should be no more execution for debt issued against the person, however or whensoever the action might have been commenced. They considered that attachments for costs are generally in cases, where there were otherwise no other means of enforcing them, and therefore they made some provision as a substitute for them; they remembered also that on executions, the plaintiff had always his remedy by fieri facias if the debtor had any property, and if he had none, they did not intend that he should be imprisoned for want of it, but only that he should be recommitted as a punishment, when he could be charged with fraud.

MACAULAY, J., JONES, J., and MCLEAN, J., concurred.

Rule absolute without costs, and no action to be brought.

MCLEAN v. McDONELL.

Any public document, filed in a public office of the government, may be proved by an examined copy.

CASE FOR LIBEL, CONTAINED IN A MEMORIAL UPON A CLAIM FOR LAND TO THE GOVERNOR-GENERAL AND COUNCIL.—At the trial the memorial was proved by an examined copy, brought by the chief clerk in the Executive Council Office, in which the original was filed, and the defendant objected to its reception, contending that the original should be produced. The learned judge, however, ruled against him, and a verdict was found for the plaintiff, with leave to the defendant to move for a nonsuit on this point.

J. H. Cameron accordingly obtained a rule nisi, against which

Blake shewed cause. This memorial was put in on a claim, which had been before the heir and devisee commission, and as the statute erects the commission into a kind of court, the examined copy ought to be admissible in the same manner as copies are admitted as evidence in judicial proceedings; but this is at all events a copy of a public document, and is admissible on that ground.—*Eyre v. Palsgrave. (a)*

J. H. Cameron in reply. The rule of evidence, which allows examined copies of public documents, applies only to public books, and credit is given to them from the manner in which they are kept by authorized officers, and the public convenience renders it necessary that they should not be removed, but this does not apply to a document of this description, and no evidence could be given of its contents without the production of the original. The original may not be in the party's handwriting; the witness who speaks to it may be mistaken, and it ought to be produced to be properly verified.

ROBINSON, C. J.—We find, that in books on evidence, this principle is laid down: “Wherever the original is of a public nature, an exemplification of it (if it be a record), or a sworn copy, is admissible in evidence, because documents of a public nature cannot be removed without inconvenience, and danger of being lost or damaged, and the same document might be wanted in two places at the same time.” (b) Memorials are sometimes required as secondary evidence of lost deeds, and in such cases it is usual to admit copies of the memorials, without insisting on the production of the original. This must depend on the same principle.

MACAULAY, J., and JONES, J., concurred.

Rule discharged.

COM. BANK, M. D. v. DENISON.

Where in an action on a promissory note the defence was forgery, and a number of witnesses were examined on both sides, and much conflicting testimony given, and the jury found for the plaintiffs, a new trial was refused, although the defendant positively denied the signature on affidavit, and produced numerous affidavits of parties who stated their belief that the signature was not his.

The plaintiffs sued the defendant as the maker of a promissory note for £88. 12s. 5d., payable to one Silas Burnham or order, and indorsed to the

(a) 2 Camp., 606.

(b) 2 Stark. Ev., 182. See also Gilb. Ev., 8.

plaintiffs. The defendant pleaded that he did not make the note. The evidence at the trial was only of the handwriting of the defendant, by those who had often seen him write. It was contradictory, some witnesses declaring that they believed the signature to be his, others that they were satisfied that it was not ; it was shewn also that Burnham, the endorser, who had discounted the note, had absconded, charged with several forgeries ; but it was also proved, that he and the defendant had had large transactions together, and that the defendant had frequently indorsed his notes. It was left to the jury by the Chief Justice, who tried the cause, without any expression of his opinion upon the fact, referring it altogether to their judgment on the evidence, and they found for the plaintiffs.

G. Denison, Jun., obtained a rule nisi to set aside the verdict, on the ground that it was against law and evidence, and also filed the affidavits of many persons, who swore that they had been long intimately acquainted with the defendant, and knew his handwriting well, and that they were convinced the note in question was not signed by him. He also filed an affidavit of the defendant, positively denying the signature to be his, and shewing that Burnham, the endorser, had absconded, charged with several forgeries, as was also stated at the trial.

J. H. Cameron shewed cause. The case went fairly to the jury, and as it was a mere question of fact, and was solely for their consideration, the court cannot now, consistently with general principles, disturb the verdict. The defendant called all the witnesses that he thought necessary, and the jury having found for the plaintiffs, that verdict should not be set aside. There was no surprise on the defendant, he knew what his defence was to be, and he should come fully armed to meet the case. He cited *Carstairs v. Stein* (*a*), *Belcher et al. v. Prittie et al.* (*b*).

ROBINSON, C. J.—There is difficulty in the way of granting a new trial. The defendant knew that the case would entirely rest on the question of his signature. On the one hand, it is a circumstance in his favour, that Burnham the endorser, who discounted the note, has absconded under the suspicion of having committed several forgeries of this description. On the other hand it is to be considered, that this defendant had undoubtedly often endorsed notes for Burnham, though some ground was laid for doubting whether at the time of this note being made, he would have done so. The jury found for the plaintiffs, having all the facts before them, with the evidence of many intelligent and respectable witnesses on the question of the handwriting, and being left to form their opinions without prejudice, for I had really no strong impression either one way or the other, and was therefore careful not to influence their finding by the slightest intimation of my opinion on this apparently doubtful fact. If they had found for the defendant, I should certainly not have been willing to have disturbed the verdict, and I think that we should be creating an embarrassing precedent in the administration of justice, if we were now to grant a new trial, for if we were to do so, and the jury should find on the second trial for the defendant, I do not know why we should consider that verdict final and satisfactory, any more than this. It would seem to be taking the matter rather into our hands, in a

peculiar case of this kind, to refuse a third investigation. If the amount were very large, it might form a reason for taking a course, which would certainly not be usual, but there is not that ground. *Carstairs v. Stein* (*a*) is very strong against interfering in such a case.

MACAULAY, J., JONES, J., and HAGERMAN, J., concurred.

Rule discharged.

McGREGOR v. WHITE.

A township collector may sue for the amount of an assessment for common schools, under 4 & 5 Vic., ch. 18, in a division court.

Crawford moved for a rule nisi for a writ of prohibition to the division court of the third division of the District of Bathurst, on the ground that they were exceeding their jurisdiction, in proceeding to enforce by action, at the suit of the collector of the township of Beckwith, the payment of an assessment for common schools. He contended that the demand was not of such a nature as could be made the subject of an action in the division court. It appeared that judgment had been given, but no execution had issued.

ROBINSON, C. J.—We do not refuse this rule on the ground that the defendant applies after judgment, because that would not be an objection in such a case,—*Roberts v. Henley* (*b*)—when the defendant cannot be said to have acquiesced in the jurisdiction, and where the want of jurisdiction (if the court in this case had it not) appears on the face of the proceedings. But it appears to us, that the statute 4 & 5 Vic., ch. 18, sec. 10, entitles the collector to sue for the rates in the division court, as being a court of competent civil jurisdiction. It makes it in effect a debt due to the collector, and being of the amount which can be recovered in the division court, that court is the court of competent civil jurisdiction within the terms of the statute. If it is intended to be urged that the rate has been illegally imposed, that question cannot be raised on this motion, as the writ of prohibition proceeds simply upon the principle, that the inferior court has no jurisdiction in the particular case.

MACAULAY, J., JONES, J., and McLEAN, J., concurred.

Rule refused.

MCDONALD *et al.* v. DICKENSON.

Under the Bankrupt Act, 7 Vic., ch. 10, sec. 74, a person having obtained his certificate of discharge in bankruptcy, under the ordinance passed in Lower Canada, is discharged from his debts in Upper Canada, which were proveable under the Lower Canada commission.

S. Kirkpatrick shewed cause against a rule nisi to discharge the defendant from custody on execution. The defendant applied for his discharge under the Bankrupt Act, 7 Vic., ch. 10, sec. 74, by which it is enacted, "that the certificate of discharge obtained by any bankrupt, from any of the commissioners, acting under the ordinance hereinbefore recited, and by this act repealed, at any time prior to the passing of this act, or under any commission or warrant in bankruptcy now subsisting, or which shall have been issued before this act shall come into operation or effect, shall

from and after the passing of the act be deemed valid and effectual, as a discharge to such bankrupt *throughout this province*, from all debts due by him at the date of such commission, and made payable under such commission." The defendant shewed by affidavit, that being a bankrupt in Lower Canada, he obtained from commissioners acting under the ordinances recited in the statute, before the passing of the act, a certificate of discharge, which he produced, that the debt for which he was in execution in this suit was a *debt due by him at the date of the commission*, and a debt proveable under the commission, and therefore he claimed to be discharged from custody.

ROBINSON, C. J.—It may seem, and we confess it does seem to us an extraordinary provision, that a debt due to an inhabitant of this province from a person resident within its jurisdiction, and who may have within the province abundant property to satisfy the debt, should be discharged because the creditor did not avail himself of the bankrupt law of another colony, and go to a jurisdiction there in search of a dividend out of such assets, as the commissioners there could control, while he may have been aware that the debtor had property in Upper Canada sufficient to satisfy his whole debt, upon account of which he gave him credit, and which the commissioners acting under the law of another province could not reach, but which, through the jurisdiction of the courts in this country, where the creditor and debtor both resided, he could have made the means of satisfying his debt; still if the enactment clearly applies to this case, we cannot refuse to give it effect. The defendant living in this country was a partner in a mercantile firm doing business in Montreal, which has become bankrupt, according to the ordinance passed in Lower Canada, when it was a separate province. That ordinance did only apply, and could only apply, to Lower Canada. If the legislative body which passed it had attempted to give it an operation, which should affect the rights of persons resident here, over persons or property in this province, the attempt would have been nugatory. The commissioners appointed under that ordinance, knew well that they had nothing to do with discharging debts or judgments here, or barring the remedies of the inhabitants of this province against the person or property of debtors residing within the jurisdiction of Upper Canada, and they did not pretend to give any discharge of the kind. Their certificate is properly granted in terms which restrict only the future recourse against the property of the debtor in Lower Canada. But, after all this has been done, the legislature of the united provinces, having unquestionable authority to make laws binding throughout, have in this altered state of things passed this statute, *ex post facto* in its operation, extending the effect of the certificate which had been granted, and making it an absolute discharge throughout the whole of Canada, of all debts due by the bankrupt at the date of the commission, and made proveable under it. We have therefore only to inquire—was this debt due at the date of the commission; and, if so, was it proveable under it? There can no doubt, we think, upon either point. It does not lie in the mouth of the plaintiff here, to say there was no debt due at the time of the commission issuing; for it is quite clear upon their proceedings, that the debt for which they have judgment, if due at all, must have been due then. And the debt was plainly proveable under the commission: it would have been strange if the debts of foreign creditors

had not been made proveable, for then they would be shut out from a dividend under the commission ; and, if the debtor had no property except what had become vested in the assignees, as would often, perhaps generally, be the case, they would be precluded from any possibility of obtaining satisfaction, either total or partial. No doubt these plaintiffs might have claimed as creditors, if they had pleased ; the hardship is that, not being obliged to do so, and not having, under circumstances like the present, any inducement to do so, they should, by an ex post facto law, be shut out from enforcing payment of their debt, by such means as they can adopt in Upper Canada, by reason of what had been done in Lower Canada, when it was a separate province ; but the words of the act are positive, and the rule must therefore be made absolute for the defendant's discharge.

MACAULAY, J., JONES, J., and McLEAN, J., concurred.

Rule absolute.

LONGWORTH v. HYNDMAN.

In case for a libel charging the plaintiff with being a "convicted felon," a plea that in a memorial to the Lieutenant-Governor he had confessed that he had been found guilty of bigamy, is bad, as an argumentative and insufficient way of pleading a justification.

Case for libel for charging the plaintiff in a letter to a third person with being a "convicted felon." Plea, that in a writing signed by the plaintiff, and purporting to be a petition addressed to the Lieutenant-Governor, &c., the plaintiff acknowledged and confessed that he had been, at a certain court of oyer and terminer, &c., found guilty of bigamy, wherefore the defendant afterwards published, &c., demurrer and joinder.

J. H. Cameron for plaintiff. The plea is clearly bad. It is intended as a justification, but it is not properly pleaded. The admission of the plaintiff as charged cannot be a justification, as the court cannot tell what the object of the petition was, and the confession of having been found guilty cannot at any rate support the charge that the plaintiff was a *convicted felon*, as the judgment might have been arrested, or the plaintiff might have been pardoned, &c.

Blake for defendant. The plea may be supported ; as a communication made by the plaintiff himself originally, cannot afterwards be made by him the ground of an action for damages against another. He first put the report in motion, and if the giving up the author, at the time that the report is mentioned, is a justification in slander, surely shewing that the plaintiff was himself the origin of the mischief, must be sufficient in libel.

ROBINSON, C. J.—We are of opinion, that the plaintiff is entitled to judgment. It is no defence that the plaintiff, in a memorial signed by him, and addressed to the lieutenant-governor (but, for all that appears, never sent, nor in any way published, though that was admitted to have been done in the argument, to obtain a decision on the main point), stated that he was found guilty of bigamy at a court of oyer and terminer. 1st. A person found guilty of a felony by a jury is not a *convicted felon*, which are the words charged ; he is not convicted until judgment has been given. 2d. This is only an argumentative and insufficient way of pleading the truth.

Judgment for plaintiff.

OVIATT v. BELL.

In an action of trespass for false imprisonment, a plea justifying the arrest as a constable without warrant, under the Hawkers' and Pedlars' Act, 58 Geo. III., ch. 5, for pedling without license, must shew that the plaintiff was *found trading* at the time of the arrest, and that the defendant took him before three of the nearest justices of the peace.

TRESPASS FOR FALSE IMPRISONMENT.—Plea, that before the imprisoning, &c., the defendant was a constable of the Home District, duly acting as such, and that the plaintiff was on, &c., a pedlar and trading person, carrying to sell, exposing for sale, and selling and trading goods and merchandize in the city of Toronto, without a license for so doing, contrary to the statute 58 Geo. III., entitled, &c.; and the defendant being such constable on the day and year aforesaid, by virtue of such statute, in the execution of his duty, did then and there gently lay his hands on the plaintiff, and did then take and carry him before George T. Denison the elder, George T. Denison the younger, and John Armstrong, being three of his Majesty's justices of the peace, to be dealt with according to law, &c. General demurrer and joinder.

J. H. Cameron, in support of the demurrer. The plea is badly pleaded as a justification, under 58 Geo. III., ch. 5, sec. 3. That clause enacts "that it shall be lawful for any constable, &c., to seize and detain any such hawker, pedlar, or petty chapman, or other trading person as aforesaid, who shall be *found trading* without a license, contrary to this act, or being *found trading*, shall refuse or neglect to produce a license according to this act, after being required so to do, in order to his or her being carried, and they are hereby required to carry such person or persons so seized, unless he or they shall produce their respective licenses, before three or more of his Majesty's justices of the peace, the nearest to the place where such offence or offences shall be committed, &c." Now, it is not alleged that this plaintiff was "found trading;" and unless he was, the defendant had no authority to act, as the act requires that the party should be caught *flagrante delicto*, to warrant the constable's summary interference. *Cave v. Mountain* (*a*) is in point. Then there is no such officer as a constable of the Home District; the stat. 33 Geo. III., ch. 2, provides for the election of constables of townships, but not of districts; and a constable of the district could have no authority as such in the city of Toronto. Then it is not shewn that the plaintiff was taken before three of the nearest justices, which is a fatal defect. (*b*)

Sherwood, Q. C., for the defendant. This is not the same as a case arising under the petty trespass act, where a party "found committing" an offence may be arrested without warrant; that statute gives the power of arrest to the owner of the property trespassed upon, or his servant, as well as to a peace officer; but here it is confined to constables and persons having a duty to perform, and it must be sufficient to shew that the party was selling and trading without a license, without requiring an allegation that he was actually found trading at the moment of arrest. As to the defendant being a constable of the Home District, he is such, if acting only for a township, and may be so properly described; and as the statute gives

(*a*) 1 M. & G. 257.

(*b*) 2 Keb. 559; 1 Saund. 263 c., note 6.

authority to *any* constable to make the arrest, it can be of no consequence that he is not alleged to be a constable of the city of Toronto. Then the plaintiff is not stated to have been taken before three of the nearest justices; but that cannot be a necessary allegation, as how is it to be proved; and would the defendant be responsible, in this action, if he had omitted one magistrate a little nearer the place of offence than another? The cases cited on this point will hardly be found of force now, and they cannot at any rate be considered applicable.

ROBINSON, C. J.—The plea is bad on several grounds, but certainly in not shewing that the plaintiff was found trading without a license at the time of the arrest. Without that, the defendant had not authority under the statute to apprehend the plaintiff, as upon view of the offence and without warrant. The plea rather describes the plaintiff as a person following the occupation generally. It ought to have stated that the constable seized him *flagrante delicto*. I think, also, that it was necessary to aver in the plea, that the defendant took him before three of the nearest magistrates.

MACAULAY, J., JONES, J., and MCLEAN, J., concurred.

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Judgment for plaintiff.

JACKSON v. McDONALD.

Where in case for slander, the declaration alleged that one A. B. had been murdered, and that the defendant had said to the plaintiff of the deceased "that boy, who is now lying a lifeless corpse on that floor, you have been the cause of his murder, and his blood lies upon your head," meaning thereby that the plaintiff had feloniously murdered the said A. B. and the defendant demurred because the inuendo was unwarranted by the charge, the court held the declaration good, because it was for the jury to determine whether the words charged were spoken in the sense imputed to them.

CASE FOR SLANDER.—The plaintiff declares that one A. B. had been barbarously and inhumanly murdered, and that the defendant desiring to have it imputed and believed, that the plaintiff had been guilty of murder, spoke and published, &c., of and concerning the plaintiff, and of and concerning the said murder, the words following, that is to say, "that boy," meaning the said A. B., "who is now lying a lifeless corpse on that floor, you" meaning the plaintiff, "have been the cause of his murder, and his blood lies upon your head," meaning that the plaintiff had been and was guilty of feloniously murdering the said A. B. Special demurrer—because the words spoken are not in themselves actionable, and that the inuendoes therein are not supported by the inducement or words laid. Joinder in demurrer.

Sherwood, Q. C., for defendant. The declaration is insufficient. The inuendo is unwarranted, and the words do not and cannot import that the defendant murdered the boy; they may as well import and do more obviously import that he had been the cause of the murder being committed by another, through some means which might make him morally though not legally guilty of the crime; they may mean that the death may have been caused by the defendant exciting the public mind, but they do not support the inference drawn from them in the declaration. A case in Bulstrode (*a*) is the nearest in point, and there the court held the declaration bad.

Blake for plaintiff. The sense in which the words are spoken and the truth of the *inuendo* are for the jury to determine. If the meaning were innocent, it should have been pleaded, and therefore unless the words cannot possibly have a slanderous meaning, the court will uphold the declaration, for words with an *inuendo* affixing a slanderous meaning to them, cannot by demurrer have an innocent meaning attached to them,

ROBINSON, C. J.—We are of opinion that we cannot determine upon this demurrer that the words charged will not bear the sense imputed to them, and may not have been spoken with the intention ascribed to them, and in such a manner as to carry that meaning to those who heard them. Suppose for instance that it was known to the bystanders that the boy had been murdered by some one in a crowd, who fired a gun at the instigation and by the order of a third person; that it was uncertain who gave the order, and that the defendant taking upon himself to fix the charge on the plaintiff, had said to him, “you have been the cause of his murder, and his blood is on your head.” In that case, he would be understood by the bystanders to speak the words in such a sense, as to charge the plaintiff with the legal offence of murder, as a principal in the first degree, being present aiding or abetting, though not the person who fired the shot. The words do not necessarily convey the charge laid, but they may have been spoken with the intention of conveying that charge, and may have been so understood. In that case, the plaintiff must be admitted to charge that they were so spoken, though it may seem against their obvious sense, as is often the case in actions for words spoken ambiguously or ironically. Upon the trial the plaintiff must prove that the words were spoken in the sense he alleges they were, or he cannot recover; and as we cannot determine that the fact was not so, he must have judgment on this demurrer.

MACAULAY, J., JONES, J., and MCLEAN, J., concurred.

Judgment for plaintiff.

CAMPBELL *et al.* v. CAMERON.

Where a verdict is taken subject to a reference to arbitration, the court will not, unless under very peculiar circumstances, allow the award to be moved against, after the first four days of the term after it has been made.

J. H. Cameron moved for a rule nisi to set aside the award made in this cause, which had been tried at the last London District assizes, and a verdict rendered for the plaintiffs for £300, subject to be reduced or a verdict entered for the defendant by arbitration, the reference being of the cause and all matters in difference, the award to be made by two arbitrators named by the 4th October, and if they could not agree, by an umpire, by the 7th October, ready to be delivered to the parties in difference, and in case the defendant should refuse to attend the arbitration, the arbitrators were to proceed *ex parte*. On 7th October, the umpire made his award in writing, reciting that the arbitrators did not agree or make any award by the 4th October, and he awarded £200. 4s. 1½d. to the plaintiffs with the costs. This award it was now moved to set aside because the umpire made his award on the evidence taken before the arbitrators, and without examining witnesses himself, and the defendant swears, that the umpire made his award from the statements of the defendant's arbitrator, as the defendant was informed and believes; that the

umpire was not present during the whole of the arbitration, and could not have been in possession of the facts of the case; that he, the defendant, did not know of the award until after last term, that he has never seen it, nor had any copy or notice of it, further than his being taken in execution on a judgment entered on the verdict and award.

Cameron in support of the motion. It may be objected that the application comes too late, but then it must be considered that it is not merely a reference of the cause to arbitration, but also of all matters in difference, and the rule as to time will not apply. The statute 8 & 9 Will. III, ch. 15, does not extend to awards made under an order of nisi prius; and here the defendant shews that he could not have moved within the first four days of the following term, or indeed within the term at all, as he did not know of the award until the term was over. *Raus-thorn v. Arnold* (*a*), shews that it is not an invariable rule that the award should be moved against under circumstances similar to these, within the term after the award was made.

ROBINSON, C. J.—No ground is furnished by the affidavits, for supposing that anything was in question before the arbitrators, beyond the matters involved in the action at law, and in such cases, the party is held to be under the necessity of moving within the first four days of the next term. The defendant does not swear that *an award* was made before last term, but that he did not know of *said award*, and had no *copy or notice of said award*. He may mean that he did not know there was any award made; but that is not what he says. He ought distinctly to have denied knowledge of *an award* being made; and even if he had done so, I am of opinion that that would not have been sufficient. There being a verdict against him, on which the plaintiff would be entitled to enter judgment in the next term, in case of an award being made, there was some measure of diligence incumbent upon him. He ought to have inquired whether an award had been made; and if he had done so, and could not obtain it, or a copy of it, that would, according to several authorities, have excused his delay in moving; because, if refused a sight of it, he could not tell whether he would have occasion to complain of it or not. But he seems to have done nothing, but merely let the time pass by. I think that it is, besides, evident on the affidavits and award that no new matter was awarded on, nothing but what the action, if it had gone on, would have settled; and in such cases, the courts are stricter in holding a party to move within the first four days of the following term.

MACAULAY, J., JONES, J., and MCLEAN, J., concurred.

Rule refused.

WATSON v. TERWILLEGER.

The court refused to entertain a motion to increase the damages in dower, where no point had been reserved, and where the motion was not made until the second term after the assizes at which the cause was tried.

This was an action of dower, tried at the last Home District assizes, in October, when the plaintiff obtained a verdict, and damages were assessed for the detention of the dower. No point was reserved at the trial, nor any motion made last term.

Boulton, Q. C., now moves the court to increase the damages, by adding (according to the yearly value found) for the time between

bringing the action, and the day of the inquisition or verdict, and also adding damages for a period antecedent to six years, for which time only the plaintiff was allowed to recover damages, under stat. 4 Will. IV., ch. 1, which was incorrect, as the defendant did not plead the statute.

ROBINSON, C. J.—We cannot now entertain this application (if we could increase the verdict as the plaintiff desires), as the motion is made too late.

Rule refused.

HAMILTON v. MINGAY.

Where a defendant was arrested on mesne process and committed to prison, and afterwards charged in execution in the cause, without a new affidavit, before 7 Vic., ch. 31, the court held he was not entitled to his discharge, as the plaintiff could issue a writ of capias ad satisfaciendum against him without a new affidavit, as well where he had been committed to prison on the mesne process, as where he had been held to special bail.

The defendant was arrested upon mesne process, on an affidavit of debt on a promissory note made by the defendant to the plaintiff. The declaration was for money lent, and on an account stated. The defendant did not give bail, but remained in custody until judgment was entered and execution issued against him, on a cognovit given by him on the same day that the declaration was filed.

Dalton obtained a rule nisi to set aside the ca. sa., and discharge the defendant from custody, on the ground that a new affidavit was necessary before the issuing of a ca. sa., when the defendant had not put in special bail, and that there was a variance between the cause of action in the affidavit of debt and in the judgment.

Crooks shewed cause, and contended that the ca. sa. was properly issued.

Dalton, in reply. The first point depends upon the construction put upon our statute 2 Geo. IV., ch. 1, sec. 15. Now that clause says, "that in all cases where the party has been *held to special bail*, it shall not be necessary to make or file any further or other affidavit before suing out a capias ad satisfaciendum upon the judgment obtained in the same action; and that in cases where the party has not been *held to special bail*, a writ of capias ad satisfaciendum may issue after judgment, upon an affidavit of the same form as is hereby required to be made for the purpose of suing a capias in mesne process, or upon affidavit by the plaintiff, his servant or agent, that he hath reason to believe that the defendant hath parted with his property, or made some secret or fraudulent conveyance thereof, in order to prevent its being taken in execution." Here the defendant has not been *held to special bail*, and therefore the affidavit required by the statute in such a case is necessary for his arrest in execution. *James v. Askew* (*a*) is in point, as are also *Bates v. Pilling* (*b*), and *Bennet v. Burton* (*c*), all of which cases arose under the British statute 43 Geo. III., ch. 46, by which a party arrested and *held to special bail* is entitled to costs, if a less sum is recovered than was sworn to, and in those cases costs were refused because the defendant had not been *held to special bail*. There is also a variance between the affidavit of debt and declaration, and as that would be a sufficient cause to discharge bail, it must be equally sufficient to release the defendant.

ROBINSON, C. J.—As to the objection, that the judgment was upon a different cause of action; whether if the defendant had given bail, his bail would have been discharged, on the ground of variance between the affidavit of debt and the declaration, is not a clear point, but it is a very different question from the present. The defendant must well know himself, whether the demand which he confessed was not the same as that for which he was arrested; it might have been consistently with the declaration. If it were not, he might shew it on affidavit, and then, no doubt, the 2 Geo. IV., ch. 2, sec. 15, would not dispense with the new affidavit before suing out the writ ad satisfaciendum. Upon the other point, it is clear, I think, that the defendant not having given bail, but having been arrested and lying in gaol, the plaintiff is within the scope of the statute in suing out a writ ad satisfaciendum without a fresh affidavit. The common sense of the provision in the statute is, that where an affidavit had been already made in the action, to warrant an arrest of the person, there need not be another. The case of *Edwards v. Jones* (*a*) turns upon a precisely similar point, though arising under the English Statute 43 Geo. III., ch. 46, referred to in argument. In that case, the defendant had continued in gaol, as in this case, and it was urged that as he had not given bail, and the statute was not in the disjunctive, but required both the arrest and holding to special bail, there could be no rule for costs given to a party who had not given bail, though he had been arrested and remained in custody. That case went off on another point, but two judges intimated strong opinions that the case was within the act; they said the defendant was held to bail within the meaning of the act, when he was arrested and imprisoned in order to force him to give bail. The point is the same, only it arises here, I think, in a clearer case; *James v. Askew* is no authority to the contrary, the judgment being on a different question. On the whole, what there is to be found of authority bearing on the question is in favour of holding a second affidavit unnecessary in this case, under the expression in the statute which is referred to, and the good sense of the thing is clearly on that side.

MACAULAY, J., JONES, J., and MCLEAN, J., concurred.

Rule discharged.

BANK OF UPPER CANADA *v.* ROGERS.

Where in an action against the indorser of a promissory note, and a defence of forgery, there was strong evidence that the defendant had admitted the indorsement to be his, or to have been made by his authority, whether the signature was genuine or not, and it was doubtful whether the jury had not been led to believe that the sole question for them was, whether the signature was the defendant's or not, and they found a verdict for the defendant, a new trial was granted on payment of costs.

Assumpsit by the plaintiffs, as indorsees of a promissory note made by one Silas Burnham, payable to the defendant or order, for £75. Plea, that the defendant did not indorse the note. At the trial it was shewn that Burnham and the defendant had had business transactions together, and that the defendant had frequently indorsed Burnham's notes; that Burnham absconded before this note became due, charged with several

forgeries; that afterwards one of the clerks in the bank went to the defendant with a list of the notes in the bank, including this note, to ascertain whether they bore his genuine signatures; that the defendant did not object to this note, but admitted it to be correct; that he admitted, also, to a witness named Brown, who was an indorser on another note of Burnham's, on which the defendant's name also appeared as an indorser, that that indorsement was genuine; and that indorsement was in the same handwriting as the indorsement on the note in question. The defendant was also called upon to produce his bill book, which he declined doing. A number of witnesses were called by the defendant to establish the signature to be a forgery, and they all proved that the writing was not the defendant's; and one witness, the defendant's son, proved that in the conversation between the clerk of the plaintiffs and the defendant, the defendant did not make admissions to the extent which the clerk had sworn to. The learned judge told the jury that, having heard all the evidence, it was for them to decide the question; that the principal point in dispute was, the genuineness of the defendant's signature, and that, if the evidence established that in their minds, the verdict should be for the plaintiffs; if not, for the defendant. There was no objection made to the charge at the trial. The jury found a verdict for the defendant.

Gamble obtained a rule nisi to set aside the verdict for misdirection, and as being against law and evidence.

Blake shewed cause. The plaintiffs will rely on *Cole v. The Bank of England* (*a*) in support of their rule; but the circumstances of the two cases are widely dissimilar: the action against the Bank of England was for negligence in allowing stock to be transferred in the bank books by a forgery; but then it appeared that the person, whose name was forged, came to the bank afterwards and frequently received the dividends of the diminished stock, without making any observations on the subject, and there it was clearly held that the bank had been guilty of no negligence; but here they desire to charge the defendant with a sum of money on a contract, and the evidence of his liability, either from an implied authority to sign his name, or from his admissions that the signature was his, ought to be much stronger than it was, to do away with the clear and convincing proof that the signature was not his. If the indorsement was forged, it is clear that no subsequent admission that it was genuine, could charge the defendant, as there would be no consideration for it, and the contract would be *nudum pactum*. Then what was the implied liability? There was no dealing shewn in which the defendant had any interest, no course of business with the plaintiffs from which he derived any benefit; and therefore the authority from him for the indorsement, which might have been inferred had such evidence been given, could not be implied. The plaintiffs, moreover, cannot move for misdirection; their counsel at the trial made no objection to the judge's charge, and when they allowed it to pass without observation, they must be taken to have acquiesced in it, and cannot now say that it was wrong in point of law.

J. H. Cameron in support of the rule. It was not necessary for the plaintiffs to object to the judge's charge under the circumstances, for the

whole course of the evidence has shewn, that it was their intention to charge the defendant, not because the signature was actually his, but because he had allowed his name to be used by some person in his dealings with the bank, and had thereby recognized such signature to be binding upon him. Any charge, therefore, to the jury, which merely put in issue the genuineness of the signature, was wrong, as it was not upon that the plaintiffs rested their case ; and as all their evidence was directed to the implied authority, they could not be bound to object to the charge. Then the direction was clearly wrong, and the plaintiffs must be entitled to a new trial. Cole *v.* the Bank of England is in point for the plaintiffs, for the defendant here is shewn to have been negligent in the management of his note transactions ; and from that, the jury might, with the other circumstances of the case, fairly infer that the indorsement in question was sanctioned by him. In Harding *v.* Jones (*a*), which was an action against the drawer of a bill, the defendant denied his signature, and several witnesses proved that it was not his, but he was held properly chargeable because several letters had been received from his place of business in the same writing as the bill, and he had offered to compromise. Here the defendant's conduct would surely warrant as strong an inference against him ; his negligence, his admissions, his refusing to produce his bill-book, all tend strongly to establish his liability, and the plaintiffs ought to have a new trial.

ROBINSON, C. J.—It cannot be said, that the plaintiffs can complain of a misdirection, properly speaking, because the charge seems to have been rather in favour of the plaintiffs than against them. If, indeed, the jury were led by any thing said in the course of the charge, to conclude that the only question was, whether the signature of this defendant was actually in his handwriting, and that if they believed the name was not written by him, they should find for the defendant ; then, indeed, there would be reason to apprehend that they may have found their verdict in error ; but the learned judge assures us, that he did not so express himself, and it is material that no objection to the charge in this respect was made by the plaintiff's counsel at the trial. It does seem to us, however, considering the evidence of the witness Brown, and the other evidence in the cause, tending to shew a recognition by the defendant of an authority to use his name as indorser on these bills, if not a recognition of the signatures being actually his, that the case is one in which the evidence appears to preponderate against the verdict ; and if the plaintiffs desire to have a new trial on payment of costs, we think it will be more satisfactory that the facts should be again submitted to a jury, in order that their opinion may be taken, after their being given to understand, that although a subsequent promise to pay the note would not entitle the plaintiffs to recover, if the signature was forged, yet that the question of the signature being forged or not does not depend upon the bare question whether the name was written by the defendant, but whether it was written by him, or by any person who had authority or permission to sign it. If the evidence should satisfy the jury, that from the whole of the defendant's conduct in relation to this note he must have authorised his name to have been used, it would signify nothing in whose handwriting

the name was, whether of any clerk or agent of the defendant, or of Burnham himself, or of any person unknown.

MACAULAY, J., JONES, J., and MCLEAN, J., concurred.

New trial, on payment of costs.

McCLENAGHAN v. BARKER.

A letting at an annual rent, constitutes a yearly tenancy, which continues at the same rent for the second year as the first, if the tenant remain in possession of the premises, and the landlord may distrain for the first year's rent, at the end of the second year, and the real property act, 4 Will. IV., ch. 1, sec. 20, does not determine the tenancy at the end of the first year, so as to make it necessary to distrain within six months afterwards.

REPLEVIN.—Avowry for a distress for rent under an annual demise to the plaintiff at £50, payable yearly, for one year's rent, ending 10 Feb., 1841; plea non-tenuit. At the trial it was proved, that the defendant had mortgaged the premises in question to Colonel Wells, and being about to go to England, he wrote a letter to Colonel Wells (which plaintiff delivered), saying that the plaintiff had agreed with him to rent the farm at £50 a year, and would pay the rent to him (Colonel Wells) on account of the mortgage, if he had no objection to the arrangement. This letter was written on the 16th Feb., 1840, and on the 22nd of the same month an answer was given, expressing Colonel Well's consent. The plaintiff went into possession immediately, and continued in possession for three years, during which he admitted that he was Barker's tenant, but expressed dissatisfaction that some part of the arrangements made with him had not been fulfilled. About two months after the plaintiff first went into possession, a lease from Barker to him was sent to him for execution, but he refused to sign it, without assigning any reason for the refusal. The distress was made in May, 1842. Upon this evidence the plaintiff's counsel contended that the tenancy was between the plaintiff and Colonel Wells, and not with the defendant; that there was only an agreement for a lease, and that even if there were a yearly tenancy, yet that by the operation of the stat. 4 Will. IV., ch. 1, sec. 20, that tenancy expired at the end of the first year, and a distress could not be legally made unless within six months afterwards. The learned judge, however, being of a contrary opinion, a verdict was found for the defendant for the amount of the rent, with leave to the plaintiff to have a verdict entered in his favour for nominal damages, if the court should think that his objections ought to prevail.

J. H. Cameron having accordingly obtained a rule nisi,

Freeman shewed cause. It is a tenancy from year to year, and being so must be looked upon as a tenancy for at least two years certain; and then as the distress was made immediately after the second year, it was clearly within time. The tenancy at a certain rent was at once created, and there was no intention of making it contingent upon the execution of a future lease. As to the stat. 4 Will. IV., ch. 1, sec. 20, that cannot apply, as it is applicable only when the holding has been for more than twenty years.

J. H. Cameron, in reply. If the court will take the admissions of the plaintiff, vague as they were, as proof of a complete holding, then the

right to distrain would attach, but the tenancy seems to have been rather with Colonel Wells than the defendant, as the rent was to be paid to him, and his authority was required for the letting. Had there been no reference to Colonel Wells, and his interest on the mortgage being in arrear, he had called on the tenant to pay him, the payment to him might have been pleaded against the landlord's distress; but here at the outset of the agreement, the rent is to be paid to the mortgagee by the tenant, and that must surely oust the landlord of his right to distrain, as much as if the rent were to be paid to him. Then, the tenancy had expired for more than six months before the distress. The 4 Will. IV., ch. 1, sec. 20, says, that in the case of a verbal tenancy from year to year, the right of the person entitled, subject thereto, &c., "to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years, &c., or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)." This tenancy, for the purpose of the statute of limitations, would expire at the end of the first year, if there were no subsequent payment of rent, but the statute says, that the right to make a "distress" shall also accrue at that time, and therefore the tenancy is determined so as to prevent a distress altogether, if the landlord does not proceed within the six months allowed to him by the statute 8 Anne, ch. 14.

ROBINSON, C. J.—We are of opinion that the defendant should retain his verdict. The letting was by the defendant, and not by Colonel Wells. Such was the fair construction of the letter of which the plaintiff was the bearer, and of which it is reasonable to suppose that he knew the contents. His own declarations prove the same thing. We think also that a demise was sufficiently proved by the letter, and the plaintiff's admissions of the footing upon which he was in possession. We see no evidence of an intention in the parties to have a formal lease executed, and the refusal of the plaintiff to sign one, when it was prepared, warrants the supposition that he at least did not contemplate a written lease. It is enough that a tenancy from year to year, upon an agreement to pay £50 yearly rent, was clearly proved. Then there was here a demise from year to year, at £50 a year, and when the tenant passed over the first year, he was tenant for a second year on the same terms. That year expired on 16th February, 1842, and the distress was in the May following. With respect to the argument founded on the Real Property Act, 4 Will. IV., ch. 1, sec. 20, I am of opinion that that clause must always be taken in connection with the 16th clause, and that it can have no effect on the rights of parties until twenty years have elapsed, when its operation applies, and not before. In the mean time it does not alter the principle of the common law, which determines the relations of parties as to tenancy and terms of holding; and besides, the pleadings in this cause do not open that question.

MACAULAY, J.—I conceive that the tenancy was sufficiently made out, and that therefore the defendant is entitled to retain his verdict. As to the point under the statute 4 Will. IV., ch. 1, I give no opinion, as the question argued could not be brought up on this record.

JONES, J., and McLEAN, J., concurred.

Rule discharged.

KEATING v. THE COUNCIL OF THE DISTRICT OF SIMCOE.

An action of debt is maintainable against a municipal council upon a contract entered into with the building committee for building the gaol and court house of the district, before the district was set apart, and it is sufficient in the declaration to describe the building committee as such, without naming the persons of whom it was composed.

DEMURRER.—The plaintiff declares in debt against the Council of the District of Simcoe. For that whereas the building committee for building the court house and gaol of the district of Simcoe, duly nominated and appointed by the justices of the peace within the county of Simcoe, under and by virtue of the statute in that behalf made and provided, to contract for and superintend the erection and completion of the said court house and gaol under the control of the said justices (and on behalf of the inhabitants of the then district of Simcoe), acting under and by virtue of such nomination and appointment as aforesaid, and on behalf of the inhabitants of the said intended district, and under the control of the justices aforesaid, on the first day of January in the year of our Lord 1843, was indebted to the plaintiff in £350, for the price and value of work then done in and about the erection and completion of the said gaol and court house by the plaintiff for the said building committee at their request, acting in the behalf and under the control aforesaid, and in £250, for money found to be due from the said building committee so acting as aforesaid, to the plaintiff on an account stated between them, which said several monies were to be respectively paid by the said committee on behalf of the said inhabitants to the plaintiff on request. And whereas afterwards, to wit on 11th January, in the year last aforesaid, and while the said building committee were so indebted to the plaintiff in the said last mentioned sums of money, for and on behalf of the inhabitants of the said intended district of Simcoe, the said intended district was in accordance with the provisions of the statute hereinbefore mentioned duly proclaimed the district of Simcoe, whereby and by reason of the said monies remaining due an action hath accrued, &c. Yet neither the defendants nor the said justices, nor the said building committee, nor the inhabitants of the said district have paid the said sum above demanded, or any part thereof. Special demurrer, that the building committee are not named, but are assumed to have a corporate existence or power; that it is not averred or shewn that any contract according to the statute in that behalf was entered into; that there is no averment of any liability or debt incurred in the name and on the behalf of the said inhabitants, and that the debt claimed is not shewn to be the lawful debt or liability of the inhabitants or justices or treasurer of the said district. Joinder in demurrer.

J. H. Cameron for the defendant. The plaintiff by his pleading has assumed that the building committee have a corporate existence, as without that assumption he could not charge that they had as such, made a contract; the names of the persons composing the committee should have been set out, and as under the statute 7 Will. IV., ch. 2, they are empowered to contract only *in the name* as well as on the behalf of the inhabitants of the district, it should have been averred that the contract was so made by them, to satisfy the requisites of the statute.

Blake for the plaintiff. The declaration is sufficient. Stating the contract to have been made by the building committee, does not invest them with a corporate name; they are called the building committee in the statute, and the plaintiff only applies the name that the legislature has given. It would be difficult, perhaps impossible, to state the names; one part of the contract may have been made at one time, and another part at another, and the committee may have been at the different times, composed of different persons. In the *Huddersfield Canal Company v. Buckley* (*a*) a committee of the commissioners of the canal was described in the same way, without noticing the individuals composing the committee. Then the contract is alleged to have been made on behalf of the inhabitants, and that must be sufficient, without charging it to have been made in their names.

ROBINSON, C. J.—The building committee are empowered by 7 Will. IV., ch. 2, Sec. 14, to contract for a gaol and court house. This is not an action against them, and they are, I think, sufficiently referred to in the inducement, by the same term of "building committee," as is used throughout the statute. It was not necessary to state their individual names. The *Huddersfield Canal Company v. Buckley* seems to shew that the same course was taken there. Then I think that the cause of action is shewn to be a debt contracted within the scope of their authority, for work done for them to the gaol and court house; and that the amount stated is by reasonable intendment, to be taken as of and concerning the business which the building committee was authorized to contract for; the words "so acting as aforesaid" carry that meaning when read in connection with the preceding part of the declaration; they were acting under their appointment, and their appointment is stated to have been for the purpose of contracting for and superintending the erection of the gaol and court house. Then admitting that this is shewn to be a debt contracted by or through the agency of the building committee, acting within the scope of their authority, is it therefore a debt for which the district council may be sued? That turns on the statute 4 & 5 Vic., ch. 10. By that act they are made a corporation, subject to be sued and capable of suing. Then is this a debt chargeable upon them as representing the district? I think it is. It is a debt of the district of Simcoe, due by it as contracted on its behalf by the building committee, which debt under the 43rd clause of the last mentioned act, the district council are compelled to assume. We have already determined in the case of the Ottawa District Council *v. Law et al. (b)*, that the proper interpretation of that clause is, not that the district council can sue and be sued only where the justices could formerly have sued or been sued, for that would be a construction which would render the 1st & 43rd sections of the act of little value in point of convenience, either to the district, or to persons having claims upon them. The obvious meaning of the 43rd clause is, that the contract shall not be prejudiced or altered in its *terms* and *conditions*, by their being substituted for the justices. We have so construed the act in favor of the district councils, and of course the same construction must prevail against them. The justices are liable upon the facts stated as for a debt due by the district, and by the justices through their agents, the building committee.

MACAULAY, J., concurred.

JONES, J.—I am of opinion that the defendants are entitled to judgment, although upon some points in the case, I agree with my brothers. I do not think that it was necessary to name the individuals composing the building committee, as it is named merely as inducement, but it ought to have been alleged that there was a contract for building or completing the gaol and court house, and that it was made *in the name*, as well as on behalf of the inhabitants of the district, and as these objections are pointed out by special demurrer, they are entitled to prevail.

JONES, J., dissenting.

Judgment for plaintiff.

STANTON *et al.* v. WINDEAT.

In trespass quare clausum fregit, and plea of not guilty, a judge at nisi prius may amend the description of the locus in quo in the declaration, but a description of a house being on the "corner" of a lot, is not supported by shewing that it is near the corner, but that there are two or three other houses between it and the corner. A grant from the crown conveying land to within one chain of a river, means to within one chain of the edge of the river, and not of the top of the bank of the river.

Trespass quare clausum fregit, described in the declaration as the "south-east corner of Lot 3, in the first concession" of the township of Bertie. Plea, not guilty. At the trial the patent for Lot 3 was produced, which described the land as Lot 3, "in the broken front, or first concession," and as extending "to within one chain of the Niagara river." It was also proved, that if the chain from the river was to be taken from the bank of the river, that the locus in quo was in the highway; but if from the river's edge, that it was a part of the land described in the patent, and that the house in which the trespass was complained of had three other houses between it and the corner of the lot. The defendant's counsel moved for a nonsuit, on the grounds, 1st—that the lot should have been described as the "broken front," or first concession; 2nd—that there was no trespass on the "south-east corner" of the lot; and 3rd—that the locus in quo was not a part of the lot, but a part of the highway, taking the description of the patent to mean, "one chain from the top of the bank of the river." The plaintiff had leave to amend his description by introducing the words "broken front, or" before first concession, in the declaration, and obtained a verdict for £6. 10s. Od., with leave to the defendant to move to enter a nonsuit on the points taken, and if the amendment was improperly allowed.

Gwynne having obtained a rule nisi on these grounds, and for the discovery of new evidence, in a patent for the adjoining lot, which gave the land to within one chain of the top of the bank of the river,

J. H. Cameron shewed cause. The amendment was properly allowed, as it was clear that it was not prejudicial to the merits of the case. The defendant knew that the plaintiff's action was brought for the trespass committed on that piece of ground, and he came prepared to contest his right to it, shewing thereby that he was not misled. Then if he were not misled as to the description of the locus in quo in that particular, he could not be any more so because it was called the *south-east corner*, instead of the *south-east part*, or *part of the south-east part* of the lot, and

the rule requiring the abuttals to the land to be set out, or some other particular description to be given, was sufficiently satisfied by the description given, when it was shewn, as it was here, that the defendant was not prejudiced. *North v. Ingammels* (*a*), and *Webber v. Richards* (*b*), are in point. In the latter case, the court say, "The plaintiff is not to be turned round for some minute variance in one out of several particulars, but there must be a general accurate correspondence, faithfully describing the close in substance, and conveying full information to the defendant of the place in which he is alleged to have committed the trespass." As to the locus in quo being in the highway, the court have already decided in *Doe Macdonald v. The Cobourg Harbour Company* (*c*), that a patent conveying land "to the water's edge," carried the land to the water's edge, wherever it might be, and was not restricted to the point where the water's edge was at the time the patent was issued. Upon the same principle, this patent must give the land to within one chain from the edge of the river, and not from the top of the bank. The new evidence which is offered is immaterial, as it cannot affect the construction of this patent.

Gwynne, in reply. The judge at nisi prius had no power to make the amendment, as it was prejudicial to the defendant, and giving him that power would in effect be doing away with the rule of court which requires the abuttals of the land to be set out, that the defendant may have full information of the particular trespass for which the plaintiff is suing. Then the description, as it now stands, is clearly wrong: the house is not on the south-east corner of the lot, nor within two hundred feet of it, and it cannot be contended that such a description is sufficient. This is not an immaterial variance, but one which shews that the defendant must have been misled. The patent too must be taken as giving the land only to within one chain of the top of the bank, as the reservation was intended for a road, and if nearly half of it is taken away, by construing it to commence from the water's edge, the public will be deprived of the benefit which the crown intended for them. The patent for the very next lot shews what the construction ought to be, and should entitle the defendant to prevail on that part of his motion which is for a new trial.

ROBINSON, C. J.—We think that the amendment was within the discretion of the judge at the trial to allow, and it could not prejudice the defence. The alleged discovery of new evidence is of a matter not material, for the patent for the adjoining lot, cannot influence the construction of the words of the patent for another lot, when they are as plain as they are in this case. The crown having granted land in the patent for number three "to within one chain of the Niagara river," we cannot hold that the grant is to stop short of that, by holding that "river" means directly before you come to the river. If that was intended, the grant was not so made. The only room for question is, whether the plaintiffs can properly recover, inasmuch as they claim damages for the wrongful occupation of the "south east corner" of the lot, when they shew that the premises to which they refer are removed some distance from the corner, two buildings and some vacant land lying between the locus in quo and the

(*a*) 9 M. & W., 249.

(*b*) 1 Q. B., 439.

(*c*) Mich. Term, 1843.

corner. This variance was objected at the trial, and was pressed as a ground of nonsuit and reserved for our opinion. The land certainly is part of the south-east corner of the lot, but it does not constitute the corner or angle. The south-east corner of the lot was shewn to be a distinct property, held under a different title; and there is even another property intervening between that and the premises in question. We are therefore of opinion that the verdict must be set aside, with liberty to the plaintiffs to have a new trial on payment of the costs of the last trial, and to amend their declaration on payment of costs, provided they pay the costs and amend within a month; otherwise judgment of nonsuit to be entered.

MACAULAY, J., JONES, J., and McLEAN, J., concurred.

Rule accordingly.

STRATHY v. NICHOLLS.

In an action by the indorsee of a promissory note against the maker, *de injuriâ* is a good replication to a plea of usury, between the indorser and indorsee; but where the defendant pleaded as to part of the sum secured by the promissory note, that the maker made the note only for the accommodation of the payee, and that the indorse gave only a certain sum for it, and that it was transferred to him to secure that sum, and the plaintiff replied that the note was given to him to secure that sum to be paid at a particular time, but that if it were not paid at that time the plaintiff was to hold the whole sum secured by the note: it was held that the replication was bad in substance, as the defendant, being only an accommodation maker, could not be charged with more than the plaintiff gave for the note.

Assumpsit by the plaintiff as the indorsee of a promissory note for £30, made by the defendant, payable to one William Deering or order, and by Deering indorsed to the plaintiff. 1st plea—usury between the plaintiff and Deering in the indorsement of the note. Replication—*de injuriâ*; special demurrer, for multifariousness, and that the plea was not in excuse of the promise, but denying that it had ever been made because it was void for usury. 2nd plea, as to £20 10s. 0d. of the money secured by the note, that the defendant made the note for the accommodation of Deering, and without any consideration; and that afterwards, and while the note was in Deering's possession, it was agreed between the plaintiff and him that the plaintiff should lend and advance £9 10s. 0d. to Deering, and that to secure its repayment, Deering should indorse the note to the plaintiff; that the plaintiff did lend the money and that Deering then indorsed the note to him to secure its repayment, and for no other purpose, and that no other or greater sum had been lent or advanced by the plaintiff, or any other consideration given for the note, and that the plaintiff held the note for such security, and for no other purpose or consideration. Replication as to £22. 10s. 0d., that at the time of the loan mentioned in the plea, it was also agreed between Deering and the plaintiff, that the plaintiff should lend the sum of £9. 10s. 0d. for a month, without interest, and if that sum was not repaid at the end of the month, that the plaintiff should hold the note and the sum secured by it for his own absolute use and benefit; that the indorsement to the plaintiff was before the note became due, and without notice that the defendant was an accommodation maker; that the plaintiff lent the money for the month according to the agreement, but that Deering did not repay it to him at the end of the month, or at any time since, and he

prayed judgment and his damages as to 22*l.* 10*s.* 0*d.* Special demurrer, that the replication is to 22*l.* 10*s.* 0*d.*, instead of 20*l.* 10*s.* 0*d.*, and therefore departs from the declaration in which only 30*l.* are claimed, and the replication would increase that sum to £32; that the replication shews only a *conditional*, while the declaration alleges an *absolute* indorsement; that the month stated in the replication is not shewn to have expired before the action was brought; that the plaintiff has not traversed that the note was held for no other purpose than securing the sum of 9*l.* 10*s.* 0*d.*; and that the replication is double, in alleging that the note became the plaintiff's absolute property, and also that it was indorsed to him before it became due, and without notice that the defendant was an accommodation maker. Joinders in demurrer.

Eccles for defendant. The replication de *injuriâ* is bad. It is not in excuse of the breach alleged, but rather a denial that there was any breach as far as the plaintiff is concerned, because the indorsement to him being void for usury, and no interest being conveyed in the note, there never was a promise to him. If it were merely in excuse, the replication would be good; but if it be either in discharge or denial it will be bad. It is not in discharge, but it is in a denial of a promise to the plaintiff; and as it has been held, that de *injuriâ* is a bad replication to a plea shewing that the note is not in the hands of the plaintiff, but of a third person, *Schild v. Kilpin* (*a*), so here, by the indorsement being void, the same effect must follow. The replication to the second plea is bad also; it commences and concludes as to 22*l.* 10*s.* 0*d.*, whereas the plea answers only 20*l.* 10*s.* 0*d.*, and the replication shews that the note was to become the absolute property of the plaintiff only on a contingency, which is not shewn to have arisen before the suit was commenced. There is no traverse either of the agreement mentioned in the plea, and the replication is double, for the cause specially assigned.

J. H. Cameron for plaintiff. The replication de *injuriâ*, is in this case in answer to a plea in excuse, not in denial; and the modern authorities shew, that under such circumstances, it is allowable in *assumpsit*. How can this plea be said to be in denial of the promise? the plaintiff states a note payable to Deering or order, and by Deering indorsed to him; this gives him a *prima facie* right to recover it, and the defendant admitting his possession excuses the payment to him by setting up the usurious contract. *Schild v. Kilpin* was a very different case, as there the plea denied the title of the plaintiff to the note in *toto*, by shewing that it had been indorsed away by him to another person. *Curtis v. Marquis of Headfort* (*b*), and *Scott et al. v. Chappelow* (*c*), are authorities clearly with the plaintiff on this point. The second replication is also good; it shews a contract for a loan of a smaller sum to be repaid by a greater, if the smaller were not redeemed in a certain time, and in that respect is like *Barton's case* (*d*), and is not tainted with usury. As to the objection as to the sum of 22*l.* 10*s.* 0*d.* being mentioned in the replication, the new rules (*e*) do not require the commencement of *precludi non* — *Ratton v. Davis*, and *Weeding v. Aldrich* (*f*); and the 22*l.* 10*s.* 0*d.* may be rejected as *surplusage*. *Beesly v. Dolly* (*g*),

(*a*) 8 M. & W., 673.

(*d*) 5 Co., 69.

(*b*) 6 Dowl., 498.

(*e*) Cameron's Rules, page 63.

(*c*) 2 Dowl., N. S., 78.

(*f*) 1 Q. B., 496. 9 A. & E., 861.

(*g*) 6 Bing., N. C., 37.

and Atwood *v.* Bonacich (*a*). The other objections are not tenable, and the plaintiff is entitled to judgment on both replications.

ROBINSON, C. J.—As to the replication de injuriâ, we are of opinion, that however fluctuating the decisions of the courts have been on this point, since the new rules of pleading have led to the use of this replication in actions of assumpsit, the weight of authority at the present day is in favor of the plaintiff in this case, Noel *v.* Rich (*b*), Isaac *v.* Farrar (*c*), and the other cases cited for the plaintiff. If this note had been payable to bearer, and had been transferred for a usurious consideration, it could not have been denied that the person to whom it was transferred, was in point of fact the holder or bearer of the note; he would have come within the words of the defendant's contract to pay to Deering or bearer, and when asked for payment, the defence would be, "although you are in fact the bearer, I will not pay you, not because I did not promise to pay the bearer, but because you became bearer in the course of a transaction, prohibited by law; that is my excuse for not paying you." So it may be said here—that primâ facie, the indorsee comes within the words of the contract of the defendant, promising to pay to Deering or to his order. He holds Deering's order; and the defendant is shewing by his plea, that notwithstanding that, he is excused from paying him. When the defendant alleges usury or any other illegality, that would make the security void, the proof of that objection fairly lies upon him who affirms it. As the court remark in Isaac *v.* Farrar—"If this replication were not allowed, this inconvenience would follow, that the plaintiff would be placed in a worse situation than before the new rules, for a defendant by alleging fraud would throw the proof of value on the indorsee. On the other hand, if this replication be allowed, the indorsee is left in the same situation he was in before, with the additional advantage, that he is made acquainted with the defence intended to be set up, which was one great object of the new regulations." "It was not intended," Lord Abinger observed, "by the new rules of pleading to alter the position of parties." This replication merely throws upon the party setting up usury as a defence, the burthen of proving it, in all its circumstances, which is according to the justice of the case, and according to the principles of pleading, and it would be a strange effect of the new rules, if they relieved the party objecting usury or fraud, from the necessity of proving it in the first instance. From some of the cases which have been decided in England, the inference might well be drawn, that the defence was a denial of the contract as regards the indorsee, and not a matter of excuse, and it is possible that it may be so held in some case there yet, when this point comes directly in judgment, but it appears, that after some indecision on the point, the replication de injuriâ in assumpsit now rests upon that footing, that we may hold this replication good. Before the new rules, this defendant might have pleaded the usury specially, and his plea would not have been held bad as amounting to the general issue, which it would have been, if it had been looked upon as a mere denial of the contract. With regard to the second plea, the case of Wiffen *v.* Roberts (*d*) is in point, as to the matter of the defence; as the payee of an accommodation note cannot himself sue the maker upon it, so neither

(*a*) 1 D. & R. 473. (*b*) 4 Dowl. 228. (*c*) 4 Dowl. 750. (*d*) 1 Esp. C. 261.

can his indorsee unless he pays value for it, and if he only pays or lends a small sum upon the note as there, he can only enforce it for so much. The question therefore turns upon the sufficiency of the replication which is demurred to. In my opinion, the plaintiff is informal in demanding 22*l.* 10*s.*, in addition to the 9*l* 10*s.*, when only 30*l.* is by the declaration claimed as the sum payable on the note. This is not such a case as *Atwood v. Bonacich* (*a*), for the replication does not refer to the sum mentioned in the plea, which might have corrected the error. I think that there is nothing in the objection that the replication departs from the declaration in shewing a conditional indorsement, when the other states an absolute transfer. The statement is of a collateral understanding which would make the indorsement, an indorsement for the whole sum or a part, according as Deering might be punctual or otherwise, or rather it states an indorsement in the ordinary form, liable to be treated as an indorsement for part only, if such part should be paid at the day, otherwise the whole note was to be considered as transferred. The plaintiff suing after the day has gone by, and the money unpaid, treats the indorsement according to its effect when the contingency had passed, and his right had become absolute in the whole (*b*). If he shews that the facts resulted in the state of things represented in his declaration, he supports his declaration. It does appear clearly on the replication that the month had elapsed before bringing the action. I see no other objection to the replication than the one which I have noticed, respecting the sum of 22*l.* 10*s.*: I mean in point of form. Whether the replication is in substance a good answer is another consideration. It does not turn upon the principle for which Barton's case (*c*) was cited as an authority, namely, that when a lender of money stipulates to charge no interest, in case the money shall be paid at a certain day, but agrees for more than legal interest, if it shall not be so paid, it is not usury. If that were the question here, we should have to consider, whether a man lending 9*l.* 10*s.* for a month without interest, on condition that he should be paid 30*l.*, if not paid at the end of the month, would be a case to be sustained against the imputation of usury, on the principle referred to, but supposing such an agreement made, it surely does not shew that the plaintiff has bona fide given 30*l.* for this note, and is therefore entitled to recover it from an accommodation maker; he has only paid 9*l.* 10*s.* for the note, and when he receives that and interest, he receives the whole amount of what he has given for the note. I am not of opinion that the indorsee of an accommodation note, can compel the maker to pay a penalty under an agreement of this kind. I cannot call him, as to the sum of 20*l.* 10*s.* forfeited for not paying 9*l.* 10*s.* on the day, a bona fide holder for value. No question of notice to the indorsee arises in such a case. If a man finding a lost note were to pledge it for a tenth part of its value, I am of opinion the pledgee could not recover the full value upon it. On these grounds I think that there must be judgment for the plaintiff on the replication to the second plea, and for the defendant on the replication to the third plea.

MACAULAY, J.—I think according to the reported cases, de injuriâ is well replied to the second plea. The defendant was a stranger to the

(*a*) 1 D. & R. 473. (*b*) 1 Tyr. 450. 1 Bing. N. C. 435. (*c*) 5 Co. 69.

alleged usurious contract, but being the maker of a promissory note payable to order, the law *prima facie* implies a promise to pay resulting from the indorsement, and it is the breach of this implied promise that is excused by the plea. In one sense the facts shew that in law he never did promise *modus et formam*, the indorsement being void, but the plea is not the general issue, and the fact could not be proved under a plea simply denying the promise. This seems to shew that it is *prima facie* binding, and the plea is therefore in excuse of the performance of it. As to the replication to the third plea, I think that the sum 22*l.* 10*s.* may be rejected as surplusage, and the introduction be read as the said sum, meaning the 20*l.* 10*s.* stated in the plea, and that the note although conditionally indorsed in the first instance, when the time elapsed for the performance of the condition, might be declared on as absolutely indorsed. As to duplicity, it was necessary for the plaintiff to deny notice, and also to shew a contract entitling him to the whole amount of the note as against Deering, and that he was not a trustee for any part to rebut the plea. As to argumentativeness, the plea alleges that the note was indorsed to secure the 9*l.* 10*s.*, lent by the plaintiff to Deering; the replication does not deny this, but admitting it as far as it goes, adds, that it was further agreed that if the 9*l.* 10*s.* was not repaid in a month, the note was to become the absolute property of the plaintiff, but it should have averred that it had become absolutely his, and concluded with a traverse of the alleged holding of it at the time of action brought, for securing the repayment of the sum of 9*l.* 10*s.* and for no other purpose, on which issue might have been joined. As to the substance of the plea, it does not appear to me that want of consideration, as between the maker and the payee, constitutes a good defence in an action by the indorsee, unless the plaintiff had notice, or the note was indorsed after it was due.

JONES, J.—I think the replication *de injuria* well pleaded to the plea of usury. As to the other replication, on the authority of *Tewsley v. Dunlop, et al.*, decided in this court during the present term, I think the first objection as to the sum of 22*l.* 10*s.* instead of 20*l.* 10*s.* good on special demurrer. I did not concur in that judgment, but I now hold it to be law. The replication being therefore bad on that point, I consider it unnecessary to go into the other questions raised by the demurrer.

McLean, J., was not present in court, but his concurrence in the judgment was expressed by the Chief Justice.

Judgment for plaintiff on replication to second plea.

Judgment for defendant on replication to third plea.

McCRAE *v.* REYNOLDS.

When in a plea of usury to an action on a promissory note, the defendant stated the usurious lending, and averred that it was on a promise to forbear for twelve months, from 28th October, 1842, until 28th October, 1843, and that the note was given payable in twelve months to secure the payment, and the plaintiff demurred because the note was not due, including the three days of grace, until the 31st October, and therefore the contract was erroneously stated, the court held the plea sufficient, as the three days of grace were the act of the law, and not a part of the contract of the parties.

Assumpsit on a promissory note for 180*l.*, made by the defendant, payable to the plaintiff or order, dated the 28th October, 1842, and

payable twelve months after date.—Plea, that the note was given upon a usurious contract between the plaintiff and defendant for the loan of 168*l.*, for twelve months, from 28th October, 1842, until 28th October, 1843; that the sum agreed to be taken for the loan was 12*l.*, and that to secure that sum and the money lent, the defendant gave the note declared on for 180*l.* Special demurrer, assigning a number of causes, but the one relied upon was, that the plea stated the forbearance to be by the note until 28th October, 1843, whereas it would be until the 31st October, as the defendant would be entitled to three days of grace, and the note was not consequently due until the last of those days, viz., the 31st October. Joinder in demurrer.

Blake for defendant.

Sherwood, Q. C. for plaintiff.

ROBINSON, C. J.—We are of opinion that the alleged corrupt agreement is rightly pleaded here according to the fact. The money was borrowed to be repaid on 28th October, 1843, that was the agreement of the parties, and the note was given promising to pay it then; the days of grace are the indulgence of the law, not the contract of the parties, which is stated truly.

MACAULAY, J., JONES, J., and MCLEAN, J., concurred.

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Judgment for defendant.

Doe dem. ROBINSON v. CLARKE.

The son of a woman who was a British subject, but was married to an alien, and domiciled out of the King's allegiance at the time of her son's birth, is not entitled under the Provincial Statute 9 Geo. IV., ch. 21, to inherit land, which had been granted to his mother in this Province.

SPECIAL CASE IN EJECTMENT FOR LOT NO. 3, IN THE NINTH CONCESSION OF THE TOWNSHIP OF CRAMAHE, IN THE NEWCASTLE DISTRICT.

—The case set out—

Firstly. That a grant from the Crown issued to Maria Grant, in 1798, of the land in question in fee.

Secondly. That Maria Grant married William Robinson, some time in or about the year 1811, that the said William Robinson was a citizen of the United States of America, and was born there subsequent to the declaration of American independence, his father being also at the time of his birth an American citizen; that William Robinson died in the United States in 1825, his wife Maria having died in 1824, leaving the lessor of the plaintiff, her only son by the marriage, surviving her.

Thirdly. That the lessor of the plaintiff was born in the United States in 1821, and has always resided there since.

Fourthly. That Alexander Grant, under whom the defendant claims, was born a British subject, and always resided in Canada, and is the only brother of Maria Grant, the mother of the lessor of the plaintiff.

Fifthly. That Alexander Grant claimed to be the heir at law of Maria Grant in preference to the lessor of the plaintiff, whom he considered an alien, and as such heir at law conveyed the premises in question to the defendant's landlord, and the question raised for the opinion of the court was, whether the lessor of the plaintiff was an alien, and so not entitled to inherit, as the heir at law of his mother, the premises in question.

Baldwin, Q. C., for the lessor of the plaintiff. The lessor of the plaintiff is entitled to the judgment of the court by the statute 9 Geo. IV., ch. 21, sec. 1, by which it is provided, "that all persons who have at any time received grants of land in this province from the crown, &c., shall be and are hereby admitted and confirmed in all the privileges of British birth, and shall be deemed, adjudged, and taken to be, and so far as respects their capacity at any time heretofore to take, hold, possess, enjoy, claim, recover, convey, devise, impart, or transmit any real estate in his Majesty's dominions, or any right, title, privilege or appurtenance thereto, or any interest therein, to have been natural-born subjects of his Majesty to all intents, constructions, and purposes whatsoever, as if they and every of them had been born in his Majesty's United Kingdom of Great Britain and Ireland ; and that the children or more remote descendants of any person or persons of either of the foregoing descriptions who may be dead, shall be and are hereby admitted to the same privileges which such parents or ancestors, if living, could claim under this act." Here the late Maria Grant received a patent for this land from the crown, and the lessor of the plaintiff comes within the words of the statute, and is entitled to recover.

Boulton, Q. C., for defendant. The statute does not apply to this case. The title of the act is, "To secure to and confer upon certain inhabitants of this province the civil and political rights of natural-born British subjects," and the act cannot therefore have any effect upon a title derived through a British-born subject, who required no act of parliament to confer upon her the privileges to which by birth she was entitled. It is clear, that by the English law this alien son cannot inherit; the case of *Doe dem. Count Duroure v. Jones* (*a*) is in point.

ROBINSON, C. J.—The question here is, whether Robinson, the lessor of the plaintiff, is an alien incapable of inheriting lands in this province, or whether he has been naturalized by the operation of our statute 9 Geo. IV., ch. 21, and I see no room for doubt upon the facts stated. It does not appear in the case, whether Maria Grant was herself a British subject or not, but we shall presume that she was, as the contrary was not shewn; indeed, it was not denied in argument that she was a British subject by birth. That being so, the circumstance of a patent having been issued to her for lands is of no consequence; for it is quite clear, that the first clause of our statute 9 Geo. IV., ch. 21, applies only to persons who, being aliens, were intended to be naturalized under that act. Her son, therefore, the lessor of the plaintiff, stands in no other situation than any other person born in a foreign country of a mother who was by birth a British subject, but who at the time of the birth of her son was married to an alien, and domiciled with her husband in a foreign country. It was conceded in the argument that the lessor of the plaintiff could not claim as heir, unless under some provision of the provincial statute referred to, and we see none that can be supposed to apply, or to have been intended to apply to his case. It was not the intention, and is not the effect of the statute, to make all aliens natural-born subjects, wherever they may have been or may be resident, provided either of their parents had at any time received a grant of land in Canada, but only to

naturalize the children, resident in the province, of parents who being aliens had received such grants of land; and besides, assuming as we do, that the mother of this lessor of the plaintiff never was an alien, his case is wholly out of this statute, and neither the 2 Will. IV., ch. 9, nor 4 & 5 Vic., ch. 7, sec. 19, can apply, as they relate to persons claiming lands through aliens, not to aliens themselves claiming lands by descent, and bringing actions for their recovery.

MACAULAY, J., and McLEAN, J., concurred.

JONES, J., gave no judgment, having been concerned in the case at the bar.

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Judgment for defendant.

Doe KEMP v. GARNER.

Where a person enters into the possession of land, under an agreement to purchase, he is a tenant at will to the seller, and at the seller's death his heir at law can maintain ejectment against him, without any notice to quit, or demand of possession.

EJECTMENT.—The lessor of the plaintiff claimed the premises in question as heir at law to his father, who had made an agreement with the defendant to sell the premises to him, and had executed a bond to him to that effect, conditioned for the payment of the purchase money by instalments. The seller died, and several of the instalments being due, the heir at law brought ejectment without any notice to quit, or demand, of possession, and a verdict was taken for the plaintiff, subject to the opinion of the court, whether any notice to quit, or demand of possession, was necessary under the circumstances.

J. H. Cameron supported the verdict last term. The defendant was the tenant at will of the ancestor of the lessor of the plaintiff, and that tenancy determined with the ancestor's death. If the ancestor himself had brought ejectment upon non-payment of the instalments, a demand of possession would have been required, but there could be no demand necessary, when by the very nature of a tenancy at will, it expires at the death of either party. The Real Property Act, 4 Will. IV., ch. 1, declares that a tenancy at will shall be deemed to have expired for the purpose of the statute of limitations, at the end of a year from its commencement. In *Doe Stanway v. Rock* (*a*) it was held that the death of the tenant at will determined the tenancy, in a case similar in its circumstances to this, and therefore that no demand of possession was necessary, and this case must rest upon the same principle.

Miller for defendant. *Doe Stanway v. Rock*, as reported in 6 Jurist, 266, does not support the counsel for the plaintiff in his argument, to the extent which he has urged it. This defendant cannot be looked upon as a tenant at will; the tenancy is something resulting from his position as vendee of the land, and he ought to be entitled to the demand of possession. If the ancestor were obliged to make it, why should the heir be in a better position. If the defendant could not be treated as a trespasser by the one, he certainly should be entitled to the same protection against the other.

ROBINSON, C. J.—We think that the plaintiff is entitled to judgment. The defendant offered no evidence of title. He had agreed to purchase from the father of the heir, but the heir had entered into no compromise of his right, nor was there any agreement on his part expressed or implied, that the defendant should retain possession. As to him the defendant stood simply as a purchaser who had failed in his payments, with the additional fact that the agreement was not with him, but his ancestor. If from any indulgence of the ancestor, the tenant could be considered as tenant at will to him, not to be treated as a trespasser until possession demanded, still that tenancy at will ended on the ancestor's death, and the heir was at liberty to proceed without demanding possession. Doe dem. Stanway *v.* Rock.

MACAULAY, J., JONES, J., and HAGERMAN, J., concurred.

TODD *v.* THE GORE BANK.

Where the plaintiff's agent had paid into an agency of the Gore Bank at Simcoe, a sum of money, partly in cash, and partly by cheque on the Commercial Bank at Toronto, to be placed to the credit of the plaintiff with the Gore Bank at Hamilton, and the agent at Simcoe took upon the whole sum the usual commission of $\frac{1}{4}$ per cent. for transmission, but the cheque was lost in being sent from Hamilton to Toronto, and was never paid by the Commercial Bank or credited to the plaintiff. It was held that the plaintiff could not maintain an action against the Gore Bank, for the amount of the cheque, as so much money had and received to his use.

Assumpsit for money had and received, and on an account stated. The defendant paid £15 4s. 2d. into court, and pleaded non assumpsit as to the residue.

At the trial before the Chief Justice, it was proved that Messrs. Vanorman and Company, near Simcoe, in the Talbot District, were indebted to the plaintiff, and in the month of February, 1843, gave to a Mr. Fraser, the plaintiff's agent, on behalf of the plaintiff, a cheque on the Commercial Bank at Toronto, for £25 12s. 6d., payable to Fraser or bearer at sight. Fraser gave this to Mr. Salmon, requesting him to take it to the agent of the Gore Bank at Simcoe, Mr. Campbell, together with 14l. 7s. 6d. in money, in all making 40l., and to give directions that the 40l. should be transmitted to the Gore Bank at Hamilton, and placed to the credit of the plaintiff there. This was done by Mr. Salmon, who paid to Mr. Campbell $\frac{1}{4}$ per cent. on the 40l., as the usual charge for money taken by the bank agent to be transmitted. About the end of March or early in April, Fraser was first made aware that the cheque had been lost in its transmission. Upon these facts, the plaintiff was nonsuited at the trial, but leave was reserved to him to move to enter a verdict in his favor for 26l. 15s., if the court should be of opinion that on the evidence he was entitled to recover the amount of the cheque and interest, on the count for money had and received.

Crooks having accordingly obtained a rule nisi last term,

J. H. Cameron shewed cause. The action for money had and received cannot be supported; if any action is maintainable, it is an action on the case for not using due diligence in presenting the cheque. A cheque is not considered as money, unless the party receiving it choose to give it specially that character, and the only ground on which it could be con-

tended, that that character was given to it here, was that the agent received the same per centage for its transmission, that was given to him for transmitting the money. The cheque was neither given nor accepted as money, it was left with the agent to be forwarded and collected, and when paid, to be placed to the credit of the plaintiff. He cited *Boyd v. Emerson et al.* (*a*), *Alexander v. Burchfield* (*b*), *Serle v. Norton* (*c*).

Crooks in reply. As the bank agent at Simcoe charged and received $\frac{1}{4}$ per cent. for commission for remitting, as if he had received the £40 in money, the bank is precluded from denying that the cheque was taken as so much money, and is therefore accountable for the amount of the cheque, as so much money had and received to the plaintiff's use.

ROBINSON, C. J.—It appeared to me at the trial that the plaintiff could not recover in this action, and my brothers are of the same opinion. The cheque of Messrs. Vanorman and Company on the Commercial Bank, was taken to the agent of the Gore Bank in Simcoe, to be transmitted to his bank at Hamilton, in order to its being presented to the Commercial Bank, and if paid, it was to be placed to the credit of the plaintiff with the Gore Bank. For transmitting money the agent, it appears, usually charges $\frac{1}{4}$ per cent., but, I believe, it would be quite contrary to the intention of such transactions, if we were to conclude, that the agent, by taking a cheque or bill for transmission, as this was, assumes the risk of its being paid, and receives it as so much money. It is true that he charged $\frac{1}{4}$ per cent. on the transaction, but why should he not, without our drawing such an inference from the charge? The sending a cheque was quite as troublesome as sending the money, and more so, because it would be remitted in effect by merely entering it in account, and if by the agency of the bank in forwarding the cheque to Toronto, presenting it to the drawee, and receiving the money, the sum for which it was drawn, found its way to the plaintiff's credit in their books, they would have earned the $\frac{1}{4}$ per cent. upon the amount, quite as well as upon the proportion of the 40*l.*, that had been paid in cash. They charged the per centage on the assumption, that the cheque which was handed to them would produce the money; in other words, they trusted for the time to the goodness of the paper which the plaintiff's own agent placed in their hands, and so for the purpose of making the charge; anticipated the receipt of the money, as an event to follow in course, but it surely never was imagined, that for this $\frac{1}{4}$ per cent. the bank agent was guaranteeing the payment of the cheque. There is no doubt, a bank agent in any part of the country would receive a cheque or bill for any amount, drawn by any one person upon any other person, merely for transmission and collection, without concerning himself about the chance of its being paid, and there is no right to expect that they would take this trouble for nothing, whether the bill on being presented would be paid or not. I have no doubt that they would, and do, take all paper for collection without discrimination, and for the accommodation of parties. I believe it to be an every day transaction, but no one surely has conceived that in doing this, they become insurers of the solvency of parties, of whom they perhaps never heard, and for five shillings in a hundred pounds; and it is plain, that unless they must be looked upon as taking all the risk of

(*a*) 2 Ad. & El. 184. (*b*) 1 C. & Marsh, 75. (*c*) 2 M. & Rob. 201.

the bill being paid, they cannot be charged as if they actually received the money, which the form of action assumes. If the plaintiff had been a debtor to the Gore Bank, and they had taken his cheque in *payment*, as is sometimes done, agreeing to run all risks, or if by their laches they had made it a payment, the case would then have been one of a different class, but that would have laid no ground for an action for money had and received. The plaintiff would merely have been able to defend himself against any further claim of the bank on that account, on the principle that so much of his debt was paid. It is difficult to understand what necessity there could be supposed to be for the present action, for surely though the cheque may have been unfortunately lost, the Messrs. Vanormans would not, as a matter of course, refuse to pay the money which they had acknowledged themselves to owe to this plaintiff. There is no suggestion of their having become insolvent, but admitting that they are now unable to pay, or that they are unwilling, and cannot be legally compelled to do so, till the destruction of the indorsed cheque can be proved, that would only shew that these defendants may be chargeable in an action for the negligence, which has occasioned the loss. To support the present action, we must hold that the Gore Bank are to be looked upon, as having actually received the money, though it is plain they never have received it, and that their receiving the money or not (supposing the bill had reached its destination), was still dependent on the contingency of there being money at the Commercial Bank to pay it.

MACAULAY, J., JONES, J., and HAGERMAN, J., concurred.

Rule discharged.

Doe Peck v. Peck.

Where a father had conveyed a house and premises to his son in fee, and the son afterwards made a lease to his father and mother, for their joint lives, at a nominal rent, and on the same day the father and mother executed an agreement, under seal, to the son, that he should occupy the house, except certain rooms in it, and take the rents and profits of the land upon certain conditions, on breach of any of which he was to go out of possession, but the mother did not release her right under the statute, *semble*—that the mother could not, after the father's death, on the ground that she had not barred her freehold interest under the life lease, maintain ejectment for the whole of the premises without shewing a forfeiture of the agreement by breach of the conditions, although she was entitled to recover the rooms which were excepted from the son's occupation under the agreement.

EJECTMENT FOR A HOUSE AND LAND IN THE TOWNSHIP OF PICKERING.

—It appeared, that the lessor of the plaintiff was the mother of the defendant, and that the premises in question had belonged to her husband, the defendant's father, who had conveyed them to the defendant in fee, and afterwards, on 23rd September, 1841, the defendant demised the same premises to his father and mother, and to the survivor of them, to hold during their joint lives, and to the survivor for his or her life, at a nominal rent, the intention being, that they might have it in their power, in case the defendant should fail in an agreement he had made with them, to support them during their lives, to dispose of their life estate, in order to procure means of maintaining themselves. This lease contained a covenant for quiet enjoyment. On the same day, an agreement under seal was executed between the parties, by which the father

agreed that the defendant should occupy the house (excepting certain rooms in it), and take the rents and profits of the premises upon certain conditions expressed, on failure of any of which he was to go out of possession. The father died, and the mother, having demanded possession, brought this action. The defendant set up the title under the agreement, but the plaintiff contended that she was not bound by that act of her husband, and that having taken a freehold under the lease for life, and not having parted with her estate by any conveyance that could bind her, she was entitled to recover possession, without shewing any forfeiture of the conditions, subject to which her late husband had agreed that the defendant might continue in possession. The learned judge being of opinion that the plaintiff must at all events recover a part of the premises, directed a verdict for the plaintiff, and against this verdict, as contrary to law and evidence, a rule nisi was obtained which was argued last term on the points urged at the trial.

ROBINSON, C. J.—The deed of the son to his father and mother gave them the estate as joint tenants (*a*), and the husband alone aliening, his conveyance was not good for the wife's moiety (*b*). She then, surviving her husband, has a right to recover possession, and hold it for her life. The only question remaining is, whether the wife can take the estate otherwise than subject to the conditions expressed in the sealed instrument signed by her, and to which she is made a party in the premises, though the husband alone speaks by it. This instrument was executed on the same day as the deed for the defendant to the lessor of the plaintiff and her husband, and it recites the former. If the conditions that were inserted in the agreement had been inserted in the lease for lives, would they not have been equally binding on the wife as on the husband? could she, surviving her husband, hold the estate and not be subject to the stipulation that her son should hold the land so long as he performed the conditions? If such would be the effect of the conditions inserted in the same instrument, then is the effect the same, although the conditions are in a separate instrument, sealed by the husband and wife on the same day, to which the wife is thus made a party, but by which the husband alone is made to speak. It is clear that the plaintiff is entitled to the portion, because she is at all events to have the possession of the rooms, which her husband selected, for her life. And nothing can be clearer than that she ought not to desire to dispossess the defendant of the rest of the house, and the farm, &c., if he has not broken his engagements, contained in the paper which she has signed (*c*). By assenting to the deed to her husband and herself, I apprehend she must take it, subject to the condition, and if so can only recover the whole premises by reason of a forfeiture incurred. She is, however, entitled to retain her verdict, on account of the part of the dwelling house, which she is clearly entitled under the deed to possess during her life.

MACAULAY, J., JONES, J., and HAGEMAN, J., concurred.

Rule discharged.

(*a*) Com. Dig. Baron & Feme, D. 2. 2 Lev. 39. (*b*) Co. Lit. 187, b.

(*c*) Com. Dig. Baron and Feme, S. 1, 2. Dyer, 13, b. 1 Rolle, 349.

STRATHY v. CROOKS.

A special traverse since the new rules, though pleaded in an action in which the declaration had been filed at a time when it would not have been affected by their operation, must conclude to the country, and not with a verification. And where in trespass for taking goods, the defendant having justified under a distress for rent, the plaintiff replied a new lease, by which the demise under which the distress had been made was surrendered and determined by operation of law, and the defendant rejoined specially, traversing the surrender, it was held that the special traverse was bad, as it was of a matter of law.

Trespass quare clausum fregit and for taking goods. Plea, justifying the taking as a distress for rent under a demise from the defendant to one James Crooks the younger. Replication, that before and at the time of the demise of the defendant to James Crooks the younger, the said James Crooks the younger and the plaintiff were partners in trade, carrying on business at &c., under the style and firm of Crooks and Strathy, and afterwards and while the said James Crooks the younger was in possession and occupation of the house in which &c., and during the continuance of the said demise, and before the accruing due of the said rent, or any part thereof, and before the said time when &c., to wit, on &c., the said James Crooks the younger died, after having first published his last will and testament in writing, and appointed the defendant and one James Bell Ewart his executors, and died without revoking the will, and afterwards and before the said time when &c., to wit, on &c., the defendant and Ewart duly proved the will, and took upon themselves the execution thereof, and thereupon afterwards, on &c., and before the accruing due of the said rent or any part thereof, and before the said time when &c., the said Ewart as such executor, with the consent of the defendant, and the defendant in his own right, demised the house in which &c., to the plaintiff, at the will of the plaintiff and defendant, without the payment to or exaction by the defendant of any rent therefor from the plaintiff, and the plaintiff under the last demise, afterwards, to wit, on &c., entered into the said house in which &c., and was possessed thereof for, and during, and unto the determination of the said last-mentioned demise, and until and at the time when &c., and thereupon the demise to James Crooks the younger by the defendant was surrendered and determined by operation of law. Rejoinder, that true it is that the said James Crooks the younger and the plaintiff were partners in trade, carrying on business &c., but because the rent in the plea mentioned was due and in arrear and unpaid, and because the goods and chattels in the declaration were on the demised premises, and in the house in which &c., and liable to such distress for rent, and because the demise to the said James Crooks the younger was in full force and subsisting, and because the plaintiff was in possession of the house in which &c. the defendant entered to distrain, and did distrain the said goods and chattels, without this that the said demise to the said James Crooks the younger was surrendered and determined in manner and form as the plaintiff hath above thereof in his replication in that behalf alleged, and this he is ready to verify, &c. Special demurrer, because the rejoinder having been pleaded since the new rules, ought to have concluded to the

country, and not with a verification, and that the traverse was bad, because it was of matter of law. Joinder in demurrer.

J. H. Cameron in support of the demurrer. The rejoinder ought to have concluded to the country. It is admitted that, although the pleadings prior to it would not be affected by the new rules, yet that this pleading has been put upon the file since. The 36th of the new rules provides that "all special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country," and there is no saving in the rule to prevent its application to pleading at whatever time the declaration may have been filed. It is true, that there is a proviso to the 35th rule, "that nothing contained in any of the above rules or regulations, relating to pleading in particular actions, shall apply to any case in which the declaration shall bear date before the last day of Hilary Term," (a) and that this declaration bears date before Hilary Term, but the rule under which the special traverse ought to have concluded to the country, comes *after* and not *before* this proviso, and consequently is not one of the "above regulations," and it is clear that there could be no reason why it should not apply at once, as well to pleadings in suits commenced before, as since the rules came into operation. Then it is clear that the traverse is of matter of law, and must therefore be bad, as it is an acknowledged principle that matters of law cannot be brought before a jury for their decision. *Lucas v. Nockells* (b), *Hobson et al. v. Middleton* (c). And it is said in *Saunders*, "Where the words, *virtute cuius, &c.*, introduce a consequence from the preceding matter, they are not traversable" (d).

Crooks for defendant. If the new rules were held to apply to this pleading, then the rejoinder cannot be sustained, but it must be considered that the court intended to exonerate parties from their operation, when the declaration was entitled of a term prior to that which is specially mentioned in the 35th rule; and although it is true that the proviso in terms applies only to regulations before the one affecting the conclusion of a special traverse, yet it ought to be construed as relating to all the rules affecting pleadings, and if so, this special traverse according to the old rules of pleading would be good. Then the surrender as pleaded is not merely a matter of law, but is of matter of law connected with fact, and is therefore, according to *Saunders*, good. (e) This case is similar to the case of the *Grocer's Company v. the Archbishop of Canterbury*, (f) where it was held that the traverse was good.

ROBINSON, C. J.—The rejoinder being pleaded since the new rules took effect, is subject to them, though the plea was before the new rules, and the rejoinder should therefore have concluded to the country, because it pleads nothing new, but simply denies the surrender, which the plaintiff had pleaded, and by the 36th rule a special traverse must now conclude to the country as well as a general traverse. It does not appear whether the defendant means to deny the agreement set out in the replication, or the legal effect of it, and he should, I think, have taken issue on the facts, or demurred if he intended to admit them. (g)

(a) *Cameron's Rules*, p. 6.

(e) 1 *Saund.* 23.

(b) 10 *Bing.* 157.

(f) 2 *W. Bl.* 776.

(c) 6 *B. & C.* 295.

(g) 1 *Chit. 1 Pl.* 612. 1 *M. & P.* 803.

(d) 1 *Saund.* 23.

Where a person setting out a writ says that he entered by virtue of it, there a party may traverse it, because the fact whether he entered under it, or on other grounds wholly, is put in issue, as well as the legal authority of the act. But here it seems different. The plaintiff pleads certain facts, and relies on them as working a surrender; the defendant does not deny the facts, but says the demise is in full force, and traverses that the demise was surrendered in *manner and form*, as the plaintiff has alleged; in other words, he merely denies the legal inference, which the plaintiff draws from facts not disputed. The cases cited by the plaintiff shew that the legal consequences of the facts cannot be traversed. The case of the Grocer's Company *v.* the Archbishop of Canterbury, (a) which is relied on by the defendant, and may seem to the contrary, is very different from this, because there the facts pleaded on the other side, could not have borne a traverse, as the court notices in the judgment. The facts here, if untrue, might have been traversed, and as they have not been, we can only conclude, that the defendant means to rely upon those facts not being such as will in law operate as a surrender; but this clearly is tendering an issue in law, and going to the jury upon it.

MACAULAY, J., JONES, J., and HAGERMAN, J., concurred.

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Judgment for plaintiff.

NELLIS *v.* WILKES *et al.*

Where the plaintiff declared in case for an injury done to his horses by falling into a hole made in the public highway, by the water overflowing a mill dam of the defendants, and tearing up the road, by which it was alleged that it was the duty of the defendants to fill up the hole, or fence it round to prevent accidents, and the defendants pleaded that the plaintiff was driving the horses at the time, and that it was through his own carelessness and negligence and of his own wrong that they fell into the hole, the plea was held bad on special demurrer as amounting to the general issue, but the declaration was also held to be insufficient, as it ought to have been framed for the malfeasance in erecting or continuing the dam, &c., and not for the nonfeasance which was complained of, in not filling up, or fencing round the hole.

DEMURRER.—The plaintiff declares in case. For that whereas, on &c. the plaintiff was possessed of a span of horses of great value, &c., which were passing in and along a certain common and public highway leading from Hamilton to Brantford, in the Gore District, and the defendants were possessed of a certain mill dam near and adjoining to the said highway, through and over which the water in the dam flowed with great force and violence and subverted and tore up the soil of the said highway, and made and formed a large hole therein, by means whereof, they the defendants ought to have repaired and filled up the said hole in the said highway, or to have kept the said hole safely and securely fenced round, until they could have so repaired and filled up the same, to prevent cattle and horses passing in and along the said highway from falling into the said hole; yet the defendants, not regarding their duty in that behalf, suffered and permitted the said hole to remain open, &c., and did not keep the same safely and securely fenced round, whereby the horses of the plaintiff, while passing along the said highway, fell into the said

hole and were greatly injured, stating as special damage the death of one of the horses. Plea, that at the time of committing the grievances, the plaintiff so carelessly, negligently, improperly and unskillfully managed and governed the said horses in and upon the said highway, that by reason of the carelessness, negligence and unskillfulness of the plaintiff and of his own wrong, and not by means of the premises in the declaration mentioned, the said horses ran and fell into the said hole, and were injured as alleged by the plaintiff. Special demurrer, assigning amongst other causes, that the plea amounted to the general issue. Joinder in demurrer.

J. H. Cameron for plaintiff. The plea is bad as amounting to the general issue, as it shews that the accident was the result of the plaintiff's own carelessness, and not the consequence of the defendants' nonfeasance. The plea of not guilty operates under the new rules as a denial of the breach of duty or wrongful act complained of, and the wrongful act complained of here is, the not filling up or fencing round the hole, in consequence of which the injury happened; and if, as the defendants assert, that was not the cause of the accident, but it arose from the plaintiff's own wrong, it is clear that the defendants are not guilty, and the general issue is the proper plea. *Williams v. Holland* (*a*) is in accordance with this principle, and also *Marriott v. Stanley* (*b*).

Wilkes for defendants. It does not follow, that because the substance of this plea might have been given in evidence under the general issue, that therefore the plea is bad as amounting to the general issue, and it is only to this extent that it can be contended that this plea is bad, and the cases cited have no other bearing upon it; but the declaration is clearly bad, as it shows no wrongful act on the part of the defendants, for which the plaintiff can claim damages against them. The declaration does not charge them with any wrong done, it merely states a breach of duty, but no such duty is thrown upon them as the declaration alleges, and there are many authorities to shew, that the facts stated in the plea, combined with those in the declaration, make it sufficiently appear that even for a wrong done by the defendants in the highway, they would not be liable, when the plaintiff's conduct was such as is stated in the plea. *Butterfield v. Forrester* (*c*), *Marriott v. Stanley* (*d*).

J. H. Cameron, in reply. The plaintiff charges the defendants with having caused the injury by their wrongful act, and that it was their duty to have remedied the evil of which they had been the cause. If it should have been alleged, that their duty was to have kept the dam in repair, and that it was in consequence of the want of proper repair that the highway was torn up, the court will remedy the defective statement, and infer the duty with which the defendants ought to have been charged. *The Lancaster Canal Company v. Parnaby* (*e*). There are not many cases like the present to be found in the books, but *Sybray v. White* (*f*), is in point.

ROBINSON, C. J. We are of opinion that this plea is bad as amounting to the general issue, for the whole intent and effect of it is to deny, that the horses were injured by the malfeasance or neglect of the defendants,

(*a*) 10 Bing. 112. 3 M. & Sc. 540.

(*b*) 1 M. & Gr. 568.

(*c*) 11 East., 60.

(*d*) 1 M. & Gr., 568.

(*e*) 11 Ad. & El., 223.

(*f*) 1 M. & W. 435.

and to assert that it was the culpable negligence of the plaintiff himself that occasioned the accident. If what is pleaded as a defence would avail the defendants, it would only be upon the principle, that the defendants did not occasion this loss to the plaintiff, and as this is what the plaintiff must prove before he can establish any cause of action, such a defence would, of course, entitle the defendants to succeed on the general issue. It is, in fact, a denial of what the plaintiff asserts as the very foundation of his action. But independently of this objection, I cannot say, having read all the cases cited, and others bearing upon the question, that what the defendant pleads would in a case like this constitute a defence, although the consideration of this point is unnecessary here, as it is clear in our opinion that the defendants are entitled to judgment on account of the defects in the declaration, which are not of that nature that they can be cured by the defendants having pleaded over. It is not stated in the declaration, that the defendants had either wrongfully erected, or wrongfully continued a mill dam, but simply that they were possessed of one. It is not alleged that it kept back the water wrongfully, until suddenly and with violence, by reason of some defect of the dam, the water came down in such quantities or in such a direction as it could not have come in, if the stream had been left to flow in its natural course. It is not shewn that the dam occasioned the injury at all. For all that is stated, the dam may have been rightfully erected in the first instance, or the defendants may by long enjoyment have acquired the right, at least as regards all other individuals, to continue the dam, and the road may have been afterwards laid out there, and dedicated by individuals, in which case I am not prepared to say that such laying out and using of a highway would render that wrongful, which before was rightful. But admitting that the keeping up of the dam was wrongful, which is not stated in the declaration, and admitting also that the defendants, by holding back the water, and afterwards suddenly allowing it to escape (which is not stated) occasioned the injury, still we cannot derive from such facts the legal inference, that a duty was thereby thrown upon the defendants to fill up the hole, or to fence it round. They had no right to put a fence in the highway for any purpose, nor any right to fill up the hole, for that would be taking out of the hands of the overseer of highways, the duties which the statutes of the province entrust to him, and cast upon him. The repair of the highway is in this country the care of the public. The defendants would in general be liable to be indicted for a nuisance, if their mill dam caused in any way a break or chasm in the highway, and any individual suffering a particular injury from such a cause, if the keeping up of the dam were unlawful, and the injury clearly resulted from it, would have a right of action in consequence, but that would be for the malfeasance of erecting and continuing the dam, which had collected and penned back the water, and prevented its issuing in its natural course, not for an omission or neglect to repair a highway, which it would not be the right or duty of the defendants to repair. Where in *Sybray v White* (a) a pit or shaft had been sunk by the defendant in his own land, and the plaintiff's horse fell into it, it was held to be a culpable neglect, that the defendant had not secured the

mouth of the shaft, because he had a right, and it was his obvious duty to do so, and it could not be the duty of any body else; but if the defendant had wrongfully dug a pit in the plaintiff's land, and the plaintiff's beast had fallen into it, the action must have been for the malfeasance in digging the pit, and not for the nonfeasance in not fencing it round, for there is no principle of law, on which it could have been said that that duty was thrown upon him, and moreover he could not have gone upon the plaintiff's land for the purpose. The want of duty is in this case, we think, as clear as it would be in that; and it is because this action is brought for nonfeasance, where it could lie only for malfeasance, that the declaration is in our opinion bad, and the defendant is entitled to judgment; but as the pleadings are defective on both sides, we think that each party should have leave to amend.

MACAULAY, J., JONES, J., and HAGERMAN, J., concurred.

Rule accordingly.

CARGILL v. FLINT.

In trespass for taking goods, a plea that at the time when, &c., the goods were the goods of the defendant, and not of the plaintiff, is good, but it ought to conclude to the country, and not with a verification.

TRESPASS FOR TAKING GOODS.—Plea, that at the said time when, &c., the said goods and chattels were the goods and chattels of the defendant, and were not the goods and chattels of the plaintiff, wherefore the defendant took and converted them, &c., and this he is ready to verify. Special demurrer, because the defendant instead of simply denying that the goods were the plaintiff's, or that the plaintiff had the possession thereof, has pleaded matter amounting to a general traverse of the plaintiff's right, and because the plea concludes with a verification, while it does not confess even a colourable title or right in the plaintiff. Joinder in demurrer.

Benson for plaintiff.

Wallbridge for defendant.

ROBINSON, C. J.—I am of opinion that the defendant, by denying the plaintiff's property in the goods, gives an implied colour for his right of action, the effect being the same, as when the defendant in trespass quare clausum fregit pleads liberum tenementum, and there would therefore be no objection to his pleading this specially, though the same defence would have been open to him on the general issue, before the new rules of pleading. As to the form of concluding, we are clear that the conclusion should have been to the country, as the plea denies the plaintiff's assertion that the defendant had taken his goods, and the unnecessary addition that the goods were the defendant's cannot vary the case. If this could ever be regarded as a special traverse of a particular fact, still it must now, since the new rules, equally conclude to the country. *Strathy v. Crooks* (*a*). The defendant, in pleading that the goods were his and not the plaintiff's, does not disclose facts incompatible with the plaintiff's case, since the plaintiff may have a right to the possession of them, and such an interest as may enable him to maintain trespass.

(*a*) Ante page 44.

Hayselden v. Staff (*a*). The plea therefore is not I think bad, ~~as~~ amounting to the general issue, though it discloses matter that might have been given in evidence under the general issue, according to the old rules of pleading. But on the other objection that the plea should have concluded to the country, the plaintiff is clearly entitled to judgment.

MACAULAY, J., JONES, J., and HAGEMAN, J., concurred that the conclusion of the plea was bad.

Judgment for plaintiff.

DAVIDSON v. BARTLETT & MURNEY.

One of the joint makers of a promissory note cannot plead that he made the note, with the plaintiff's knowledge, only as a surety for the other maker, and that the plaintiff gave time to the other maker without his knowledge or consent, and that he was thereby discharged; and if such a plea were tenable, *de injuriâ* would be a good replication to it.

The plaintiff declares in assumpsit against the defendants as the makers of a joint and several promissory note, made on 17th July, 1840, payable to R. B. Sullivan or order, on the first day of November then next, for £265 11s. 0d., and indorsed to the plaintiff. Murney pleads that he signed the note as surety for the other maker, Bartlett; that the payee of the note well knew this at the time of making the note; that after the note became due, and while the payee held it, the payee and Bartlett agreed, without Murney's consent, that the payee should give Bartlett time for payment upon his furnishing Forsyth and Wells' acceptance for the amount payable 21st November, 1841; that this arrangement was made and the accepted bill furnished on account of the said promissory note, without Murney's knowledge or consent; and that the payee of the note after it became due, indorsed to the plaintiff without Murney's knowledge, &c. Replication, *de injuriâ*. Special demurrer, because the matter pleaded was not matter of excuse, but of discharge. Joinder in demurrer.

J. H. Cameron in support of the demurrer. The replication cannot be sustained, as the plea is in discharge, and not in excuse of the breach of promise complained of. It is clear, that although the general replication *de injuriâ* has been introduced since the new rules, it can only be pleaded under the same restrictions, as in trespass, and therefore that when it attempts to answer matter pleaded in discharge it is bad. If instead of this being the case of two joint makers of a promissory note, it had been the case of a maker and indorser of a promissory note, there can be no doubt that the giving time to the maker would exonerate the indorser, and that the language, which would be used to denote his relief from liability, would be that he was *discharged*. Now in this case it is to be assumed that the plea constitutes a good defence, as there is no objection intended to be made to it, and then if the giving time to the principal discharges the surety, the defence set up here is matter of discharge, and not of excuse, and the replication is bad.

Draper, Q. C., for plaintiff. Admitting, for the purposes of this argument, that the plea is good, the replication is a sufficient answer. The

decisions in England, since the first introduction of this replication in actions of assumpsit, have not been uniform, but the general principle, which has pervaded them all, warrants the replication in this case. (He here reviewed the various cases.) Here the defendant does not plead a discharge of the note, he sets up an excuse for its nonpayment, and such excuse may be well answered as this has been. *Reynolds v. Blackburn* (*a*) *Isaac v. Farrar* (*b*), *Scott et al. v. Chappelow* (*c*).

ROBINSON, C. J.—The first question which suggests itself is, whether the plea is any answer to the action; or in other words, whether one joint maker of a promissory note can set up that he was only a surety for the other, and that he has been discharged, by the plaintiff giving time to that other without his knowledge or consent. This court has decided in more than one case, that he cannot set up such a defence, because it is inconsistent with what the note on the face of it imports, and those decisions are in accordance, I think, with the weight of authority. *Laxton v. Peate* (*d*) is a case, where on the authority of Lord Ellenborough, it was held otherwise, but the correctness of the ruling there, has always been questioned and sometimes denied. *Fentum v. Pocock* (*e*) certainly stands directly opposed to it, and so do many other cases (*f*). Mr. Chitty, in his treatise on bills, seems to consider *Laxton v. Peate*, as no longer to be relied on. Mr. Justice Bailey, in his work on bills, speaks of it as of doubtful authority; and Mr. Story, in his treatise on the same subject, considers that in England in the present state of the authorities, the point may still be deemed open to controversy. He states that in the American courts, “the parties are bound by the character which they assume upon the face of the bill; that if by that, they are liable as primary debtors, then as to the holder they are bound as such, and his knowledge at the time when he takes the bill, that either of them is an accommodation party, will not vary the case.” I consider the question in *Fentum v. Pocock* the same as in this case, the acceptor of a bill standing on the same footing as the maker of a note. *Price v. Edmunds* (*g*) was a case precisely like the present, where one of two joint makers of a note, set up as a defence that he was only a surety, and claimed to be discharged by time being given to the other. The case went off on the ground that in effect time was not given, and the point which I am now considering was not expressly adjudged, but the language of some of the judges is very strong against such a defence. In the case now before us, it is not stated in the pleadings that the plaintiff (the indorser) had any knowledge of one of the makers being a surety only. If it were incumbent on us to determine whether the plea is in this case a good defence, I should give my opinion that it was not, in accordance with what has already been decided here, and also in accordance, as I think, with the reason of the thing; for no matter by what motive a man may be impelled to join another in making a note, whether merely to oblige him, or for any other reason, it should be presumed, when he does sign it as an ordinary maker of a note, that he consents (for reasons which he has

(*a*) 7 Ad. & El. 161. (*c*) 2 Dowl. N. S. 87. (*e*) 5 Taunt. 192.

(*b*) 4 Dowl. 750. (*d*) 2 Camp. 185.

(*f*) 6 Price, 111. 6 Dowl. 234. 10 B. & C. 578. 1 B. & Ad. 698.
3 M. & W. 208. 4 Ad. & El. 675. 7 Bing. 508. 8 Bing. 150. Selw. N. P. 360.
Pitman on principal and surety, 183, note.

(*g*) 10 B. & C. 578.

thought sufficient) to place himself in the situation which his signature in that capacity imports, and he should be held liable upon the note at least, as a principal. Whether the point, if it arises hereafter, shall be considered as still open in this court or not, it seemed necessary to advert to it here, in order that it might not be inferred from this case, that the defence was conceded to be admissible. The plaintiff is entitled to prevail, however, independently of this point, as in my opinion the replication is a good answer to the plea. The cases which have arisen upon the replication de injuriâ since the new rules of pleading, are numerous, and not easily, I may say, not possible to be reconciled, for there was evidently an uncertainty and fluctuation in the minds of the judges, in the first attempts to carry out the new system of pleading in those cases, which seemed to call for and allow the replication de injuriâ to special defences in assumpsit, and the unsettled opinions upon the point led to several contradictory decisions. The plea in this case is not consistent in itself, for in one part it states that the bill of exchange taken by Mr. Sullivan was given as *security* for the payment of the note, while in another part it states that the bill was received by Mr. Sullivan "for and on account of the note, and the monies due thereon," as if it were a substituted security. Taking all the plea together, we cannot take it to be pleaded otherwise than as a giving time on the note, until the bill should come to maturity, and not that the taking the bill is pleaded as a *discharge* of the note. Then taking the plea in that sense, I consider the weight of authority in favor of this form of replication, looking upon the matter pleaded by the defendant as an excuse for not paying, and not as a matter of discharge, and notwithstanding the facts pleaded here, all took place before this plaintiff's right of action vested. The cases cited by the defendant's counsel are conclusive, I think, in favor of the replication in this case. Nothing is denied by the plea, which is stated in the declaration, but an excuse for not performing a contract which results from the facts declared on and not denied, is advanced, as arising from facts dehors the contract, something that has taken place since the contract was made, and between the payee and a third party not known to this plaintiff, and not being a discharge of the contract in its direct and obvious legal effect, but something put forward as a reason, why in equity and good conscience this plaintiff should not have the benefit of the undertaking, which the note on the face of it imports. What is pleaded is not pleaded as a discharge; if it were it is in my opinion no discharge, upon which account I should hold the plaintiff entitled to judgment on the demurrer, because the defendant's plea is no defence; but I agree also in opinion with my brothers, that the plaintiff is entitled to judgment, because his replication, which is demurred to, is a good answer to the plea.

MACAULAY, J.—I think the replication good, on the ground, that although the original promise to pay the holder was broken, while the note was in the hands of the payee, and the matter of defence arose subsequently, and though in an action between such original payee and the defendant, it might not be admissible, yet that inasmuch as the original validity of the note is not disputed, nor the debt extinguished, by any thing operating as a positive and absolute discharge, though the note was indorsed to the plaintiff after it was due, a *prima facie* promise

in law to pay the plaintiff as indorsee arose upon such indorsement, and so arose from a title acquired by him *after* the subject matter existed, which relieved the defendant from performing such *prima facie* or implied promise; it constituted an excuse as between the plaintiff and defendant, for his breaking the implied promise in law resulting to the plaintiff from the indorsement to him, and the breach of which promise the replication says was *de injuriā*. The defendant admits making the note, the indorsement to the plaintiff, and the non payment, but excuses the breach of the promise, because the implied promise was not made until after the note was due and the defendant relieved from the obligation to pay, by reason of the former holder giving time to the principal debtor, while the note was in his hands. It seems clear that if *de injuriā* in *assumpsit* can only be pleaded in excuse of the breach of promise alleged, the facts constituting such excuse must have existed before the breach, and that matter arising after the breach, and after a right of action had (by reason thereof) accrued and vested, and which went to shew a discharge of such right of action, or that the debt was gone by reason of something that occurred after the breach, cannot be put in issue by such replication, as it alleged that the defendant broke the promise, without the cause of excuse alleged, and a plea of matter *ex post facto* would not sustain an excuse, but a discharge of the breach of promise. *De injuriā* is applicable when the matter pleaded is in excuse of the non-performance of the promise, and such as shews that although the promise was broken, no right of action was vested in the plaintiff; otherwise where the breach and the vesting of a right of action are admitted, and the matter pleaded is subsequent matter, discharging or exonerating the defendant from the liability that had accrued, excusing him from damages by reason of the breach, but not excusing him from having committed the breach of the promise itself. *Smith v. Whatley* (*a*).

JONES, J.—The question seems to me to turn principally upon the defence set up by the plea, and the authorities on the subject are very conflicting. In *Day v. Prendergast* (*b*), in which the defence that time had been given, arose in an action on a bond, Abbott, C. J., in giving judgment, said—"Bills of exchange stand on a different footing; there the law merchant operates, and the courts of law decide upon them with reference to that law. Guaranties for the payment of debts, are not in general instruments under seal, and there is no strict technical rule which as to them prevents a court of law from looking to the real justice of the case." In *Pease v. Hirst* (*c*), which was an action on a promissory note, drawn by three as sureties for a fourth, Bayley, J., says,—“here, by the form of the instrument, none of the parties have placed themselves in the condition of sureties. They appear on the face of the instrument to be principals.” In *Laxton v. Peate* (*d*) Lord Ellenborough decided at nisi prius, in an action by the indorsee against the acceptor of a bill, accepted for the accommodation of the drawer, that the acceptor was discharged by a compromise with the drawer, the indorser being aware at the time that he took the bill, that it was an accommodation bill. In another case (*e*) Chambre, J., says,—“the acceptor of a bill is to be considered the prin-

(*a*) 6 Jurist, 1015.
(*b*) 5 B. & Al., 187.

(*c*) 10 B. & C., 122.
(*d*) 2 Camp., 185.

(*e*) 3 B. & P., 266.

cipal and the other parties sureties. If a creditor gives time to the principal debtor, the sureties are discharged in law and equity." The correctness of the ruling in *Laxton v. Peate* was doubted by Lord Mansfield in *Raggett v. Axmorr* (*a*), and was expressly over-ruled in *Fentum v. Pocock* (*b*), which establishes that the acceptor of a bill for accommodation (who is thereby in fact merely a surety for the drawer), is not discharged by time given to the drawer, although the holder knew that the bill was accepted for accommodation, and without consideration. If this case be law, I do not see how a joint maker of a promissory note, who makes himself a principal by the instrument (as does the acceptor by his acceptance), can discharge himself by shewing, that time was given to the other joint maker, for whom he was only a surety. *Price v. Edmonds* (*c*) was a case like this. It was decided upon the ground that no time had in fact been given, but the judges all intimate an opinion that the evidence was inadmissible to shew that the defendant was a surety. He was a principal on the face of the instrument, and parol evidence could not be admitted to shew that he was a surety. They fully recognized also the correctness of the law established in *Fentum v. Pocock*. In *Bell v. Banks* (*d*), in which there was a similar plea to this, no question seems to have been raised, but it appears to have been taken for granted that the plea was good. I think the better opinion is, that the joint maker of a promissory note, sued by the payee, cannot shew that he was a surety for the other maker, in contradiction to the note itself, by which he makes himself a principal, in order to prove that he has been discharged in consequence of time having been given to the other maker, the principal debtor in fact. I concur also in the opinion expressed by my brothers, that the replication is a good answer to the plea.

HAGERMAN, J., concurred.

Judgment for plaintiff. (*e*)

BABY v. BABY.

Where a testator devised as follows, "As touching my worldly estate, I give, devise, and dispose of the same in the following manner:—I will that my just debts be paid, should any remain unpaid at my decease. I hereby give and bequeath unto my executors, hereinafter named, my real property, for the express purpose of satisfying the same; after which I will, that the residue of my lands, messuages, hereditaments, and premises, with my personal estate, or the proceeds thereof (if sold by my executors, which I hereby authorize them to do, for the benefit of my children), be divided in equal shares among my six beloved children; namely—Eliza Ann, James Francis, Charles Thomas, Henry Raymond, John Edward, and William Lewis;" and then appointed certain persons to be his executors. Held that the children took an estate in fee, and not for life, in the real estate.

Special case from Chancery. The Honourable James Baby, being seised in fee in possession of certain lands, tenement, and hereditaments,

(*a*) 4 Taunt, 730.

(*c*) 10 B. & C., 578.

(*b*) 5 Taunt, 192.

(*d*) 3 M. & Gr., 258.

(*e*) See also *Brown et. al. v. Langley*, 4 M. & Gr., 466, in which A. borrowed a sum of money from a loan society, and the defendant joined him in a joint and several promissory note for the amount. At the time of the loan, a printed book of the society's rules was given to the defendant. By these rules it was stated, that after default by the principal, notice would be given to the surety,

and possessed of certain personal property, duly made his will, by which he devised as follows, "As touching my worldly estate, I give, devise, and dispose of the same as follows. I will that my just debts be paid, should any remain unpaid at my decease. I hereby give and bequeath unto my executors, hereinafter named, my real property for the express purpose of satisfying the same; after which I will, that the residue of my lands, mes- suages, hereditaments and premises, with my personal estate, or the proceeds thereof (if sold by my executors, which I hereby authorize them to do for the benefit of my children), be divided in equal shares among my six beloved children, Eliza Ann, James Francis, Charles Thomas, Henry Raymond, John Edward, and William Lewis; and I constitute, make, and ordain, the Honourable Thomas Clarke, the Honourable and Reverend Dr. John Strachan, William Allan, and Jean Baptiste Baby, Esquires, my executors, &c." The executors duly proved the will, the six children being alive, and one of them, James Francis (the plaintiff), being the heir at law, and the question to be determined was, whether the children took estates for life, or in fee, under the will of the testator.

After a full argument last term by

Draper, Q. C., Blake, and Esten for the plaintiff,

Burns and J. H. Cameron for the defendants,

The court now gave judgment.

ROBINSON, C. J.—I am of opinion, that the children take an estate in fee. The will is short and informal, but it is plain, consistent, and intelligible. It contains no expression that is obscure, or of doubtful meaning; there is no misapplication of legal terms, nor any repugnance of one part of the will to another. It is, therefore, free from those faults which give rise to most of the questions upon the construction of wills. No one, I think, can read it and not be satisfied that the testator intended to give to each of his children an equal portion of his real estate (after debts paid), to be enjoyed by each, as fully as the heir at law, who is one of them, was to enjoy his portion—that is, to them and their heirs. Then, believing this to be the testator's intention, if the will shall not carry the fee, it must be because, to pass an estate of inheritance, it is necessary to use certain technical words of inheritance in a will, as well as in a deed; but it is quite certain, that there is no such rule, and that on the contrary, it is a well-known principle, that the mere want of the technical words of inheritance in a will, has not the effect of preventing the devisee from taking a fee, where the intention to give a fee is clear, there being in this respect a well-settled distinction between a deed and a will. When I say I have not a particle of doubt that this testator intended to devise to all his children an estate in fee, of course I mean that I find the evidence of that intention on the face of the will. In the first place, the testator begins with words which shew that his intention was to leave all the interest that he had. "As touching my worldly estate," he says,

and that if the money was not then paid, legal proceedings would be taken. The book was not signed. Held that these rules did not constitute an agreement in writing contemporaneous with the note so as to be admissible to vary the contract on the note; and Coltman, J., says, "It is a well-established rule, that a party to a bill or note shall not be allowed to vary or contradict the express engagement he has thereby entered into, except by a contemporaneous agreement in writing."

"I give, devise, and dispose of the same as follows." He was seised, it is stated in the case, of various estates in fee, and it seems from these words, that his intention was to dispose of whatever he had, and therefore to devise the fee. Undoubtedly less force is now given to words of this kind in the commencement of a will than used formerly to be given to them, but they are not to be of course discarded as worthy of no attention, when a question arises upon the construction. They may fitly be compared to the preamble of a statute, which often throws light upon the enactments, and may assist in explaining them, though it cannot overrule nor restrain them, where they are clear and explicit, nor enlarge them, where they are palpably deficient. But where the testator sets out by announcing an intention to dispose of all his estate, and the will contains nothing after this which is repugnant to that intention, but is merely deficient in not carrying it out formally, there these introductory words do supply an argument, and a strong argument, coupled with others, if the will affords others, in favour of the fee passing. The present, in my opinion, is a case of that kind. Then, secondly, the devise to the executors of his *real* property for the purpose of *satisfying* his debts, was clearly meant to give them a fee, for without that they could not sell, which might be necessary, as the testator intended they should, and for this reason the law without doubt gives them the fee, even if he had not used the words *real property*, which include a fee under this form of devise; but the omission of the testator to use the word "heirs" here, where the law acknowledges he must have meant the fee to pass, shews that his omitting to add the same words in his devise to his children, cannot justly be taken as any argument, that he meant to give them only an estate for life. Where a testator is careful in one or more parts of his will to use words of inheritance, and does not use them in other parts, a strong argument arises out of that difference, because he shews that he is aware of the necessity of the words, where the purpose requires it, and may be supposed to have intended something by the distinction which he has made. There is no room for that argument upon this will; the reasoning applies the other way, for by not using words of inheritance, where he must have intended to give a fee, he shews us that we are to lay little stress on his omission of them in another part. Thirdly, which in my mind would be conclusive alone, he devises his real property to his executors for paying his debts, and then adds, "after which, I will that the residue of my lands, tenements, messuages and hereditaments, be divided in equal shares among my six children," &c. Now the words "real property" clearly pass the fee; the executors therefore under this devise took a fee in all his lands, or as much as might be necessary for the purposes of satisfying his debts; then when he devises the residue of his lands among his children in equal shares, he shews that he used the words "lands, messuages," &c., as synonymous with "real property," and wished them to be taken in that sense. As if he had said, "I dispose of all my worldly estate as follows, I give my executors whatever real property may be necessary for paying my debts, and the residue I devise to my children," the residue namely of what he had devised to his executors, and that was his real property. It would seem as if the testator, looking upon the bequest (as he calls it) rather in the light of a direction than otherwise, imagined it not to be

necessary to use there any specific terms describing his real property, but that when he came to devise to his children, what they were to hold beneficially, and hold under his will, he felt it to be proper to use more particular words designating his real property, so as to leave no doubt that he had devised to them all his lands, messuages, hereditaments and premises. It does in truth sometimes happen that people get into difficulty by being too studious to avoid it, but this occurs rather in special pleading than in testaments, where the law pays great respect to the circumstances under which they are often unavoidably drawn. It would be strangely hard if five of the testator's children, the natural objects of his bounty, should be limited to a life estate in his property, because the testator thought it perhaps more regular to descend to particulars, than to leave the devise to rest on the words "real property," which he might imagine were dangerously indefinite. We may, and I think in reason ought, to import the words "real property" from the preceding part of the same sentence, and read them after the word "residue" as well as before it. This is what common sense would dictate, and it is satisfactory to find that in *Doe Knight v. Selby* (*a*), under circumstances extremely similar, the court did adopt that method of construction. Fourthly, it would seem absurd not to do this, when the consequence would be that the heir at law alone would have a fee simple in his portion, and a remainder in all, when the testator by including them all in one devise, covering all his lands, &c., clearly meant that under the same words they should all take a like estate in their several portions, though that circumstance alone could not be decisive. Fifthly, the devise of lands, &c., is in the same sentence in which he devises his personal property, which he undoubtedly means to give unreservedly, that is, the entire interest, and an argument arises from this on which much stress was laid in *Roe v. Pattison*. (*b*)

This case is perhaps not so clearly with the devisees upon authority, as it is strongly with them upon the reason of the thing and the evident intention of the testator; but yet I think there has been no period in which the courts would not have held that the devisees took a fee under this will.

There is more to lead to that construction than can be properly resisted, having regard to decided cases. Not that the authorities are all consistent with each other. It would be unreasonable to expect that they should be; but I have met with no case which would warrant us in saying that the devisees under this will take only a life estate.

The case of *Denn demise Miller v. Moore*, was referred to in the argument as bearing materially on this case, but it is clear on examining it that it can neither help nor impede the passing of the fee under this demise. The will in that case contained terms which this does not, and wants one material point which this contains. Nothing more was determined there than, first, that the words "rest and residue of my lands," &c., would not carry the fee; but in that will there was no previous devise of a fee, following which the words "rest and residue of my lands," &c., were used, as there is in this will. It was not determined in that case that the word "hereditaments" did not of itself include the fee.

Though there had been decisions to the contrary, that point was too well settled to admit of doubt; and in the case before us it was not relied upon. Then, thirdly, *Denn v. Moore* determined that "all the rest of my lands, &c., upon payment of my just debts and funeral expenses," would not pass the fee. The court of King's Bench had so adjudged, and their judgment on that point had been reversed by the Judges in Error, but was afterwards affirmed in the House of Lords; and the point has been since so well settled, that there is no room for supposing that in the case before us, any thing can turn on the doctrine of the lands being charged with debts in the hands of the devisee, being of itself sufficient to occasion the fee to pass, because this will brings up no such question. The debts being first directed to be paid "out of the estate," and "after that" the "residue of the lands" are devised; so that it is quite clear it cannot be said that these devisees take lands subject to any charge of debts. They take the lands that shall be left "after the debts," &c., are paid.

Pettywood v. Cook (*a*) was relied upon in the argument of this case, as a strong authority against the fee passing. It is not very safe to rely much on cases of that date in a question of this peculiar kind, but the terms of that will and of the present are too unlike to make that decision of any value. Then the testator expressly devised his lands for life, with remainder in fee, with remainders in several parts of the lands to his three children, using the proper words of inheritance; and he directed that if any of the three children should die without issue, the survivors should enjoy "all that part" equally divided between them. Whether such survivors should enjoy in fee or only for life was the question, and it was held that they took only for life. Without considering how this case might probably have been decided at a later period; (*b*) it is enough that there are strong points of difference between that will and the present. There the testator had used proper words of inheritance in one part of his will, which was a material circumstance against supplying them where he did not use them; and that will did not, like this, set out with announcing an intention to devise all the testator's "worldly estate." I am aware that that circumstance alone would not avail to carry a fee; that if a testator should say, "as to all my worldly estate, I dispose thereof as follows, that is to say, I devise my lands to A. B.," then the fee will not pass; though, as was observed by Lord Mansfield, (*c*) "there can be no doubt that in such a will the testator does in fact mean to dispose of the entirety." But though we must say of this part of the will, as of others, that taken alone it would not be sufficient, it is a material help, as Lord Ellenborough observed; (*d*) although such words would not of themselves carry the fee, yet *juncta juvant*.

It may seem not very logical to hold, that when one of several circumstances, tending to shew an intention to give the fee, would, if it stood alone, prevent the estate descending to the heir; yet that when several come together they "may" avail, but still it is good sense. The law desires to carry into effect what the testator meant, but there is a

(*a*) Cro. Eliz. 52.

(*b*) Vide 11 E. R. 164, where Lord Ellenborough expressly intimates that he would have decided differently.

(*c*) 1 Cowper, 304.

(*d*) 11 East. 223; 1 Cowper, 357.

difficulty in the way, from the principle that the heir is not to be deprived of his inheritance without something appearing on the face of the will, from which the intention can be plainly gathered. Now it is not inconsistent to say that any one of several circumstances may not alone be sufficient to remove the difficulty, but that the united force of all or of several shall be adequate. Still it is evident that nothing could be more difficult than to make a principle of this kind satisfactory and precise in its application. It has been always felt by the judges to be most desirable so to carry out the principle, that conveyancers and others might be able to determine from former cases what meaning would be imputed by the court to words used in any other given case, otherwise there could be no certainty or confidence. And upon most wills artificially drawn no conclusion could have been safely come to, until the opinion of a court had been actually pronounced. The desire to afford to others the means of judging by adhering to certain rules; and on the other hand a reluctance to go against the unquestionable intention of the testator in any case before them, while the law avowed it to be a rule that such intention should have effect, has inevitably led to decisions, apparently if not really, inconsistent. And, after some decisions not easy to be reconciled, and numerous cases of hardship, when the intention of the will had manifestly failed in its effect, it has at last been thought better by the legislature to reverse the rule of construction, and to enact that when a testator gives his lands without specifying the quantity of estate, it shall be held that he meant to give the fee; unless there be something in the will denoting a contrary intention. The same alteration of the law has taken place in this province; but the will before us, being made before the act passed, is subject to the former rules of construction. By the late statute, the legislature has declared its conviction that to consider the whole estate in the lands to be devised, when the lands themselves are devised, is the more correct construction and the one most in conformity with the intention of the will. We cannot allow this act to influence us in giving a construction to a will to which its operation clearly does not extend; yet it would incline me; I confess, in a case in which the authorities seemed conflicting and the rule obscure and uncertain, to determine in favour of the devisee. I mean, in a doubtful case it would turn the scale. Now in the case before us I think the weight of authority is in favour of the fee passing. I refer to *Grayson v. Atkinson*, (a) *Smith v. Coffin*, (b) *Gall v. Esdaile*, (c) *Roe v. Patteson*, (d) and *Doe dem Knight v. Selby*, (e) as cases amongst others which strongly support this construction.

The case of *Grayson v. Atkinson* more closely resembles it than any other I have found. It rests to be sure on the authority of a single judge, the Lord Chancellor Hardwicke, a name however which in point of authority is perhaps second to none. That case indeed is undistinguishable from the present in any other respect than this; but it contained one difficulty which this will does not. In other particulars the resemblance is remarkable. The will sets out in effect as this does, "as to all my temporal estate I give and devise the same as follows." Then after directing A. B. to sell any part of his real estate that may be neces-

(a) 1 Wils. 333.
(b) 2 H. Bl. 447.

(c) 8 Bing. 323.
(d) 16 E. R. 222.

(e) 3 M. & Gr. 92.

sary to pay his debts (as this will does), it proceeds thus—"As to all the rest of my goods and chattels, real and personal, moveable and immovable, as houses, gardens, tenements, my share in the copperas works, &c., I give to the said A," without making use of the word estate, or any words of limitation whatever. Lord Hardwicke held clearly upon consideration (though he at first doubted) that a fee passed. "'All the rest,'" he said, "plainly relates to something mentioned before, which he was about to dispose of—this was 'all his temporal estate,' which passes a fee when the testator has one." It was a difficulty in that case which does not apply here, "that houses, gardens," &c., were not devised in such general terms as lands, &c., are in this will, but came after the words "goods and chattels"—"as to the rest of my goods and chattels, as houses," &c. Clearly a will in such terms afforded grounds for argument in favour of the heir much stronger than they do in this case; so much so that if *Grayson v. Atkinson* had been decided the other way it would hardly have been an authority against these devisees. But decided as it has been, it seems to me to be a very clear authority in their favour; and it is an authority on which I gladly rest on a case like this, where there cannot be, and I am sure is not, in any quarter a shadow of doubt that the testator meant to make all his children equally objects of his bounty, and to give them all estates in fee in their several portions, as well as to his eldest son.

I do not find that *Grayson v. Atkinson* has been over-ruled or indeed questioned in any subsequent decisions; on the contrary, more than forty years after it was determined, it was expressly made the ground of decision in the case of *Smith v. Coffin*. (a) Cruise, in his work on real property (vol. 6, 220), cites it as unquestioned authority, and it is so cited by other writers. I find indeed in a late treatise (b) a remark in a note, which seems to intimate a doubt as to the correctness of the decision, which I think a more careful consideration of the case might have removed; and at any rate I conceive that one might well doubt in that case and not doubt in this, on account of the difference I have referred to. On the whole, I am of opinion that the devisees take a fee on the third ground stated by me; the second ground is also material; and the others help, though they would not do alone. When the testator declares his intention to dispose of all his estate, and then devises his lands to pay his debts in such terms as, it is clear, carry a fee; and gives the residue "of his lands" to his children, excluding his heir at law; I think it plain that he means the residue of his "lands" in the same sense as he before spoke of his real property, that is, his estate in his lands, &c.

I look upon the effect of the will to be this. "I give all my real property, that is, all my estates in fee (if I have any) to my executors, who are to sell as much of them as may be necessary for paying my debts; and the rest may remain unsold (i. e. the rest of my "property," the words he had before used), to be divided in equal shares among my children."

I do not attach importance to that part of the will which authorises his executors to sell for the benefit of his children, because, as I read the will, those words refer to his personal estate only.

MACAULAY, J.—I at first thought the case plainer than it now appears to me after investigation. The will was made touching the testator's worldly estate, which he first charges with his debts, and he devises his real property for the satisfaction of the same, after which he gives the residue of his lands, messuages, hereditaments and tenements, to be divided in equal shares among his six children, including the heir at law; he also with such residue includes his personal estate. I at present omit the clause respecting the proceeds thereof if sold. As to that part of his worldly estate, which was personal estate, he gave it to the said six children in equal shares. As to that part of his worldly estate, which was real property, he devised it to his executors to pay his debts, after which he gave the residue of his lands, messuages, hereditaments and tenements, to be equally divided among them also. The case states that the testator was seised in fee of divers lands, tenements and hereditaments (not saying where), but it does not shew that the testator was seised or possessed of, or entitled to, any thing that would not be included in the terms worldly estate or real property, and that would not be embraced by the words lands, messuages, tenements and hereditaments; from whence the argument is forcible, that the term residue is one of relation as respected both the subject and the interest, and means not only the residue in point of locality or description of the thing, but in point of estate or interest also; and that contemplating and construing together the different terms used in the will (such as worldly estate, real property, lands, messuages, hereditaments and tenements), and the personal estate to be divided in equal shares, the rule of noscitur a sociis applies, and leads to the inference that the residue was devised in fee. It is perhaps the soundest conclusion, and corresponding as it does with the intention indicated in the beginning of the will, best answers what was probably the real object and intention of the testator, and if so best meets the justice of the case. The cases in the books seem however to shew, first, the intention indicated in the outset may not be fulfilled in the end, the intention at first being one thing, and the execution of that intention another; (*a*) and introductory words are not in themselves sufficient to carry a fee, though auxiliary in determining the ultimate interest, unless incorporated or connected with the subsequent words of devise, which of themselves would not impart a fee. (*b*) Secondly. The words lands, messuages, hereditaments and tenements, are per se treated as descriptive only of the subject matter, and do not carry the fee. Thirdly. Notwithstanding introductory words denoting an intention to dispose of the testator's whole estate, nor although a nominal legacy be given to the heir, nor though the devise be to a class, embracing the heir, as to children, nor where the devisee is of the rest or residue after payment of debts, if the devisee is not charged therewith in respect of the lands, nor the lands so charged in the hands of the devisee, nor although the fee may pass by reason of other words in the will, as where the devise is after debts are paid, or by implication aliunde. A devise to sell gives a fee, but a devise to executors to sell to pay debts, gives it is said only a base fee, determinable when the debts are paid, and the personal estate

(*a*) 1 Wils. 334.

(*b*) 11 East. 267; 5 B. & Ad. 122; 2 Preston on Estates, 203-4.

is not exempted from the payment of debts, unless by evident demonstration, plain intention and necessary implication, shewing not only the intention to charge the real estate, but also to discharge the personal, a clear intention to exempt it. No such intent or effect can be determined, from the words used in this will. The personality remained liable, notwithstanding the charge upon the realty, a point not immaterial in my view of the case, because the will speaks of the proceeds being divided, if sold, and it is material, whether the words used empowering a sale for the benefit of the children, include lands, &c., as well as goods. If not, it may be difficult to distinguish this from some of the modern decisions, in which estates for life only have been held to be devised. The case of *Grayson v. Atkinson* (*a*) much resembles the present, but it is difficult to reconcile it with subsequent authorities, on the grounds upon which the judgment was rested; the words houses, gardens, tenements, &c., were aided there by what went before, viz., all the rest of my goods and chattels, real and personal, moveable and immoveable. In *Roe dem Shell v. Pattison* (*b*) the words were, "after all my debts and funeral expenses paid, I leave all the remainder in the above stocks, with my freehold property, to my sister, M. S." It is very much the reverse of the present. Here the testator gives the residue of his lands, &c., with his personal estate; there he gave all the remainder of certain stock, with his freehold property. The only value of that case as applied to this is, that Lord Ellenborough said, that it was clearly the intention of the testator, to give as absolute an estate and interest in his freehold property, as in his stock, a construction that by the rule of noscitur a sociis may perhaps with great force be applied here. (*c*) This case being cited in *Doe Norris v. Tucker*, (*d*) *Patteson*, J., remarked, that the devise was of the testator's freehold property, which distinguished it from that case, and which is more like the present. The words there were, "I give and bequeath to my wife my freehold estate called Poincetts during her natural life, also all my stock, goods and chattels, during her life. Item, I give to my son Richard, my heir, after the death of my wife, 10*l.* Item, all the above bequeathed *lands*, goods and chattels, after her death, I give and devise in manner following, unto my son Richard and my son Thomas, unto my son Robert and unto every other of my children then in being, share and share alike, equally to be parted between them." He first willed that his debts should be paid by his executors. Held, that the children took only life estates. Turning to *Doe dem. Moor v. Mellor*, (*e*) which appears to be a leading case on the subject, and rejecting therefrom the words "after payment of my just debts and funeral expenses," on which alone it was contended that a fee passed, and the aid of which was held insufficient, it resembles very much the present, rejecting the introductory words and the power to sell. The case of *Knight v. Selby* (*f*) is also in point. After exploring the numerous cases, which establish the principle that wills are to be construed, not so much by comparison or precedent, as by extracting from them the rules of construction by which wills are to be judicially interpreted and expounded, and the intent of the testator to be legally

(*a*) 1 Wils. 333.
(*b*) 16 East. 221.

(*c*) 4 M. & S. 366.
(*d*) 3 B. & Ad. 473.

(*e*) 5 T. K. 558.
(*f*) 3 M. & Gr. 92.

deduced or decyphered as it were, and then testing this will by their application, the proper legal deduction is not so apparent as I in the outset supposed. Antagonist to the argument in favour of the rule of noscitur a sociis, is the observation that the testator uniformly changes the expression, and that from the use of different expressions, a contrary, rather than the same meaning, must be supposed to have actuated the testator. This is again liable to be met by the remark, that though some of the words used, are as used, clearly sufficient to pass the fee by implication, yet no words in themselves sufficient to do so ex vi termini are adopted; whence it may fairly be argued, that the testator did not understand what the proper words of inheritance were. Also it may be urged that it does not appear that he had any real estate, not embraced in the term lands, &c. Still, it may be said as to the introduction, that the will does dispose of all his worldly estate, the personality being so clearly, and the real property being devised to his executors for the purpose of satisfying his debts, so far including the whole of both, and that by devising the residue of his lands, &c., to his children, it is no more than the residue thereof, after his debts have been paid thereout, and may as well be restricted to a life interest therein, as extended to a fee. The law (a) as well as the will charged his lands, &c., with his debts, and the will in addition gives his real property to his executors for the purpose of satisfying the same, both the words and the purpose giving them a qualified fee by implication, to cease when the debts are paid. In this clause he uses terms sufficient per se to pass a fee simple absolute, viz., real property; it is only qualified by the purpose, which therefore rather restrains than aids the force of that devise. The executors took a base fee, as it is termed, from a twofold principle; but when the testator comes to dispose of the residue, he does not repeat the words "worldly or real estate, or real property," nor does he use words equivalent thereto, assisted by the relative term residue, for clearly "the residue of my lands, &c., after the payment of debts, to A. B." would confer a life estate only. With this residue so worded he includes personal estate, again adopting an expression clearly adequate to give his whole interest even in lands, &c., viz., estate, a term not however used in relation to the residue of such lands, and it may as well be argued that the word estate as used was intended to designate and mark a limited interest in the lands, as that the interest in lands and goods was to be identical.

The equal division directed in both does not seem in some of the cases to add much if any force to the will. Although in 3 Burr., 1837, Lord Mansfield relied upon them, and he then said divided meant to be sold, and the produce divided.

On abridging and separating the will into its separate and distinct clauses, the words "residue of my lands," &c., will be found to stand very much isolated, and not so blended with the introductory and other clauses, or so connected or incorporated with them by reference, or necessary context, as to entitle them through the aid of other parts of the will (which they must have) to extend by implication the life interest which of themselves they would alone convey into a fee simple interest.

The will might be transposed as follows; "as touching my worldly estate, I give and dispose of the same as follows: the residue of my lands, messuages, hereditaments and tenements (after payment of my debts, and I give and bequeath my real property unto my executors, for the express purpose of satisfying the same), with my personal estate, I will to be divided in equal shares among my six children."

I have said thus much because I am not now satisfied that a fee does pass, unless the will empowered the executors to sell the residue of the lands for the benefit of the children, as I think it does; a view in which I differ from my learned brethren.

I am of opinion that the words "with my personal estate" may be treated as parenthetic, or as if they followed the word "children" at the end of the clause, or preceded the words "the residue" at the beginning thereof, in which event the words "proceeds thereof," &c., would clearly apply to lands, &c., as well as goods, if not exclusively to the lands, &c. My reasons for thinking so are, that the testator evidently desires to confer a power of sale for the benefit of his children, and such a power over the personal property would in law belong to the executors without his giving it. The goods are not exempt from sale for payment of debts, nor are they bequeathed in the form of specific legacies. That they are not exempt from sale for debts is shewn by the very power of sale given in the will, if it included the personal estate, as I suppose it does; for if funds were raised by the sale of either lands or goods, such funds would be alike applicable to satisfy the debts; and nothing is specifically bequeathed in specie so as to preclude its sale. I think the desire of the testator was to give the residue of his lands and goods, or the proceeds thereof, if sold; and the power of sale that follows was necessary to give the executors a disposing power over the lands, though not over the goods, which would have existed without it; and the effect is, that in one clause the real property is given to the executors in fee, to sell to pay debts, which estate would cease when they were satisfied, and which clause would not give a general right to sell all the lands unless necessary to satisfy debts, without incurring a breach of trust; for that express purpose, in another clause, they are empowered to sell for the benefit of the children.

The argument is strengthened by considering the meaning and force of the words "be divided" in the will; it relates more especially to the proceeds formerly mentioned, though of course it is capable of extending to the residue of the lands, though not sold. Had no provision respecting the *proceeds if sold* been introduced, the usual mode of expression would have been to will the residue of lands, &c., in equal shares to the six children; but as it is, all devised or bequeathed in that clause is to be divided in equal shares among them. And a case has been cited in which Lord Mansfield considered expressions very similar, as requiring the conversion of the lands into money, and the proceeds to be divided. In the present case, the testator might well have intended to give a discretion of this kind over the lands. The residue was not to be divided till the debts were satisfied. This might cause delay; and in the mean time, or for various reasons that might arise, it might be beneficial to the children that portions of the lands should be sold purely for their advan-

tage, if not at the same time to realize funds to pay debts. It may be further remarked that the executors are clearly to divide the personal estate if unsold, or the proceeds if sold. Yet no expression touching the division is used to distinguish between lands and goods; all are embraced in the one clause. Yet it is clear the residue of the lands were to be divided as well as the personal estate, and both lands and personality are mentioned before that part of the sentence respecting the proceeds if sold, and which I think may be equally extended and applied to both. Ascribing to the executors a disposing power over the lands, beyond what might be required for debts, consistency and meaning is given to the whole; and I must say that (considering the legal right of the executors to sell the personal effects, without any authority expressly given by the testator) the words "as with my personal estate" should be treated as parenthetic, the proceeds thereof would constitute personal estate as well as the goods and chattels, &c., possessed by the testator at his death; and there is therefore tautology, or unnecessary redundancy, in speaking of the proceeds of the personal estate if sold. He does not say his goods and chattels, or the proceeds thereof, which would be more consistent. It is just the contrary in using such language in relation to lands. The proceeds of lands if sold is something different from lands themselves, and I can see good reason and necessity for using the words "or the proceeds thereof if sold by my executors, which I hereby authorize them to do for the benefit of my children," in relation to the residue of the lands, more than for their use in reference to personal estate; a term embracing in itself goods, chattels, money, the proceeds of effects sold, as well as the effects themselves.

If such be the proper construction, then a power of sale for the benefit of children, superadded to a provision for the satisfying debts, with directions to divide the proceeds among the children, leads satisfactorily to the conclusion that the children take the fee in such lands, &c., as were not so sold, because if sold the fee would of course be disposed of and the proceeds divided. A provision in that clause of the will indicating an intention to give the children the full benefit of the testator's entire interest in the residue of the lands, as well as the personal estate. I think therefore that upon the whole the children take a fee under the will, or under the executor's deed.

JONES, J.—The rule of law applicable in this case is, that unless some words are used in a will, which by law are construed to convey a fee, the devisee takes only a life estate, but slight expressions are sufficient to pass an inheritance when the court think that such was the testator's intention. It is also a rule that the heir at law is not to be disinherited, unless the testator's intentions to disinherit him can be collected from the will. There can be no doubt as to the intention of this testator. It is quite clear that he intended to dispose of all his estate, and not to die intestate with respect to any part of it; and it further appears from the will, that he intended to disinherit his heir at law, as such, because he includes him in the residuary devise with his other children. The devise to the executors contains no words of inheritance, but being for the payment of debts it clearly gave them an estate in fee, and it proceeds—"after which I will that the residue of my lands, messuages, tenements and hereditaments, be divided in equal shares among my six children,"

including the heir at law. In this residuary devise there are no words used, which by themselves can be regarded as devising a fee; and if the words real property used in the devise to the executors had been repeated in this, there would have been no question, because the words "real property," like the word "estate," have been determined to comprehend the fee. But I think when the testator devised his lands to the executors by the term real property, to enable them to pay his debts, giving them thereby a fee, and then devised "after which I will that the residue of my lands, &c., be divided," he meant by the words used, the real property before devised for a specific object to his executors. It is not reasonable to suppose he meant to devise merely a life estate in all his real property to his eldest son, with his other children, when he intended his eldest son should have a remainder in fee, after the determination of the life estate to himself and the other children. *Knight v. Selby* (*a*) is clearly in point, and upon the construction of this will I am of opinion that the children took an estate in fee.

HAGERMAN, J., concurred.

The case was returned to the Court of Chancery with a certificate that the children took estates in fee, and not for life, under the will of the testator.

KERBY *v.* LEWIS *et al.*

Where a jury perversely give a verdict contrary to law and evidence, a new trial will be granted, although three verdicts have been given in the same way.

Case for the disturbance of the plaintiff's ferry over the Fort Erie rapids, between Fort Erie, in the Niagara District, and Black Rock, in the State of New York, one of the United States of America. Plea, general issue under the old rules. It was shewn at the trial, that on the 14th August, 1840, the Queen leased by letters patent to the plaintiff the ferry in question, describing it thus—"our ferry across the River Niagara, and between Fort Erie, in the District of Niagara, and Black Rock, in the United States of America, commonly known as the ferry at Fort Erie Rapids," on condition that he should keep a common ferry during the term of the lease, from Fort Erie aforesaid to Black Rock aforesaid, for travellers and their cattle, &c.; to hold for seven years at 50*l.* a year, with the usual covenants that the lessee should ferry soldiers, militia-men and Indians, free of charge, should observe all regulations made for the management of the ferry by the justices in quarter sessions, and should not knowingly transport munitions of war, or other contraband articles. The same lease had been produced on three former trials of the cause, which had resulted in verdicts for the defendant, which had been successively set aside as being contrary to law and evidence, and the plaintiff again proved, as on those trials, that while he was in the exercise of his franchise, or right of ferry under his lease from the crown, the defendants disturbed him in the enjoyment of his right, by carrying passengers and their goods for hire; that this injury to his rights had been openly and constantly committed, and still continued, amounting in

fact to a complete usurpation of the franchise. The jury were told that the right of the plaintiff appeared to be clearly established, and that as the fact of the defendant having ferried for hire in disregard and defiance of that right was clearly proved, and indeed was not disputed, the plaintiff was entitled to their verdict for such damages as they might choose to give. They found, however, for the defendant, as the former juries had done.

J. H. Cameron last term obtained a rule nisi for a new trial, the verdict being perverse and contrary to law and evidence.

Blake shewed cause. The plaintiff is not entitled to recover. Without at all desiring to impugn the judgment which this court has already pronounced in this case, or to contend that the crown has no right to grant a ferry between this province and the United States, yet there is no such right of the plaintiff shewn to be infringed here, as can enable him to maintain an action on the case. Although it may not be necessary that a person claiming a right of ferry, should establish in himself the ownership in the soil on both sides of the river, over which the ferry extends, yet he must shew that he has a right of landing on each side, without which his right must be rendered unavailable, and that necessary part of the plaintiff's case was not established here. If the plaintiff had desired to prove that he was authorised to land on the American side, he should have shewn either a lease from the proper authorities in the State of New York for the use of the ferry, or some right from some person having land on the Black Rock side to land his passengers there, but no such lease or authority was shewn, and in their absence it cannot be said that the plaintiff made out his case. But there is another point which was against the plaintiff, and which was purely a question of fact for the consideration of the jury, and as they have passed their verdict upon it, their finding ought not now to be disturbed. The point of departure of the plaintiff's and defendant's ferry boat was not the same, the former left more than a quarter mile higher up the river than the latter, the one leaving from Fort Erie and the other from Waterloo; and although their points of debarkation were the same, yet the authorities clearly shew that in such a case there is no interference by the one with the other's right. *Tripp v. Frank*, (*a*) *Huzzey v. Field*, (*b*) *Pim v. Curell*. (*c*) The question was purely a question of fact, and the court ought not to interfere, had this been only the first trial; much less should there be any interference, when this is the fourth time that the verdict of any case in the courts in England, in which the verdict of a jury has a jury has been had in favour of the defendants. There is no instance of been so frequently set aside as in this case, and when the facts are as favourable for the defendants, as they have been shewn to be here, there certainly ought not to be another new trial granted.

J. H. Cameron for plaintiff. The points urged by the defendants, have already been disposed of by the court, on the former motions for new trials in this cause, and if the plaintiff was entitled to relief against the perverse verdicts of former juries, he must also be entitled to relief against this verdict. It could not be necessary to shew any lease from the American government, or any authority to land on the American shore,

as it would be presumed that with a friendly state, there would be no restriction on the right to land; and if the landing was opposed, that is a fact which should have been shewn by the defendants. It is sufficient if the landing place were in a public highway, according to the decision of the court in *Peter v. Kendal*. (a) "It is not necessary that the owner of a ferry should have the property in the soil on either side of the ferry. He must have a right to land on either side, but he need not have the property of the soil. It is sufficient if the landing place be in a public highway." Here it has not been shewn that the plaintiff's landing was ever obstructed, and it must be presumed that he could land until the contrary appears. As to the number of new trials, which have already been granted, the court ought not to allow that consideration to weigh with them, or it would only require a determined opposition to law and evidence two or three times in any case, to prevent justice being done. There are many cases to shew that the court will interfere, when a jury determine to give a perverse verdict; *Parkes v. Great Western Railway Company*, (b) *Harrison v. Fane*, (c) *Levi v. Milne*, (d); and in no case is such interference more necessary than in this case, where the defendants have set themselves up in express opposition to the law of the land and the repeated judgments of the court.

ROBINSON, C. J.—Upon the general question, on which the plaintiff's recovery has before been resisted, namely, that the crown cannot by law grant an exclusive right of ferry upon a river or narrow water, which separates this province from a foreign state, the opinion of this court has been more than once expressed. That point we consider therefore is now at rest, and must assume for the purpose of this action that the crown could and can make such a grant, and that the patent under which the patentee claims his franchise is legal. This judgment of the court was no assertion of a new principle, it was simply in accordance with the open public acts of the government, since the province had a constitution, and with what has been uniformly received and acted on, as the law, since justice was administered in Canada. It was equally in accordance with the existing state of things, supported by the law of the foreign country opposite to us, in relation to the same right on their side of the ferry. There are now, and have been for thirty or forty years or more, several other ferries on waters separating the two countries, all standing on the same right, and all likewise unquestioned. Our judgment upon the general question has in this very case also been formally rendered, and is upon the record in such a shape, that it can be most conveniently reviewed in appeal. It may be erroneous, but if it be, it must be considered and overruled by a higher tribunal. Then assuming the grant to the plaintiff to be regular and valid, a point which had been urged upon the former trials, was again pressed upon this last trial, and very strenuously urged, namely, that the ferry used by the defendants was a different traverse, and no injurious interference with the plaintiff's privilege. My brother judges have examined the evidence that was before the last jury at nisi prius, and it does not appear to them that it placed the case in that respect upon any new ground. I concur in that opinion. There was nothing

shewn upon the last trial, which can enable us to say that the plaintiff was not as clearly entitled to a verdict as he appeared to us on the former trials. It was very strenuously urged on this occasion, that the constant taking of passengers between Waterloo and Black Rock by the defendants, was no interference with the plaintiff's franchise, because the point of departure on this side of the river is not the same. But that point is not new; it was discussed on former occasions in this same cause, and the opinion of the court has been given upon it. It did appear on the last trial, as upon the others, that during the time of the last lessee of the ferry, the boat had landed and departed from the village of Waterloo or near it, and this was the case for a period when one of these defendants was himself the proprietor of the ferry, under such a patent as the plaintiff now holds. It appears also, that from some motive of interest or convenience, the present lessee has adopted a new landing-place for the ferry; and upon this the defendants build the argument, that it is not the same ferry, and that they, or of course anybody else, may by consequence set up a ferry of their own, without any public authority, between Waterloo and Black Rock. But we cannot adjudge that such a consequence follows: we cannot say that the present lessee is bound to accept the same place of landing and departure that had been used before. What place had been used generally since the first establishment of the ferry, did not appear, nor whether the change made by the defendant was or was not directed or approved of by the government, or was purely an arrangement made by the lessee himself. This, at least, must be said, that it was proved to be about a quarter of a mile nearer to Fort Erie, than the old place for the ferry at Waterloo is, and therefore so far as locality is concerned, it corresponds better with the description of a ferry between Fort Erie and Black Rock, than if the boat had plied from Waterloo. It is most material also to consider, that the defendants' ferry boat, in traversing from Waterloo to Black Rock, passes up the river directly by the plaintiff's wharf; and has even, on several occasions, as was proved, taken in passengers at that wharf, and continuing its route up the river, it crosses the rapids along the very same track that the plaintiff's ferry was daily crossing, when the defendants commenced their interference with it. How can it be said, under these circumstances, that this is no wrongful disturbance of the plaintiff's franchise. If, for any reason of general convenience, it was inexpedient to make the plaintiff's wharf the landing-place, we may suppose that the justices in sessions, under the general power of regulation given by the statute, or at least the government, might insist on that being done, which would best accord with the public interest; but whether they would or not, it would be manifestly unreasonable to hold, that these defendants could make themselves judges between the lessee and the public, and upon this idea of the general good, take upon themselves utterly to disregard the plaintiff's patent, and usurp his franchise, as they have done. Then this appears to us to be a plain case of a legal right on one side, and a deliberate and injurious resistance of that right on the other. It is doubtless always to be regretted, when a court of justice finds itself obliged to interpose repeatedly, by granting new trials in the same cause. The necessity for doing so must always be lamented, and must always be avoided, when it can be with propriety. But occasions will sometimes

present themselves in all countries, whose jurisprudence resembles ours, when such a necessity must be admitted to exist: happily they have been very unfrequent in this country, but they have now and then arisen, as we know they have in England; and it is remarkable, that there is at this very moment a suit pending in Lower Canada, where the court have felt it necessary to set aside four verdicts on the same side, and a fifth verdict has just been rendered. The jury, we must suppose, on such occasions, mean to do right, and believe they are doing so. We are not to concern ourselves with their motives, or to ascribe any wrong intention to them; though, in legal understanding, it is proper to say of such verdicts as are rendered in plain opposition to the opinion of the court, when there is no dispute about the facts, that they are perverse verdicts. The legal effect of certain ascertained facts upon the rights of parties, is in general to be pronounced by the court. There are many cases, where the question is one compounded of law and fact, where much must be left to the judgment and discretion of the jury, but this is not such a case. To be compelled to set aside several verdicts in succession in the same cause is doubtless an evil; but it is a less evil, than for a court of justice to admit, that there is a plain case of a legal right defied and destroyed, and that the law can afford no protection or redress. The disturbance of which the plaintiff complains, still continues; he pays a large rent to the crown for a privilege which a patent assures to him; and although the proper tribunal adjudge him legally entitled to the franchise he claims, it is rendered in fact of no value to him, because these defendants defy and oppose him in the exercise of it, and he has been hitherto unable to obtain redress. Wherever this happens there must be a failure in duty somewhere. We must take care that the failure is not in us, and we therefore feel bound to make the rule absolute for a new trial without costs.

MACAULAY, J., JONES, J., and McLEAN, J., concurred.

Rule absolute, without costs.

Doe FITZGERALD et al. v. FINN.

Doe FITZGERALD et al. v. CLENCH.

The grantee of the crown may maintain ejectment against a person who has been in the adverse possession of the land granted, for upwards of twenty years, and it is not necessary that the crown should proceed by information of intrusion in such a case, before the grant, or that the grant should specifically convey the crown's right of entry in the land to the grantee.

Ejectment for part of Lot 57, in the town of Niagara. The lessors of the plaintiff claimed under letters patent issued to them on 13th of October, 1842, upon an allowance made on a claim by them before the Heir and Devisee Commission in the same year; the patent being for the whole of Lot 57, and allowed to the lessors of the plaintiff, as co-heiresses of James Fitzgerald, the original nominee of the crown. The defendants proved more than twenty years' uninterrupted possession of the premises, and they rested their title first, on that point; and secondly, on the fact, that a prior patent had been issued to Fitzgerald in his lifetime, for the same lot. The evidence of possession, was of a possession for some years

before 1813, then an interruption; and again in 1816, a possession, though not under any privity with the former; and from that time uninterrupted, being less than twenty years before the statute 4 Will. IV., ch. 1, but more than twenty years before action brought. The evidence, with respect to the prior patent, was that of two persons, who swore that many years ago they had seen the patent in the possession of one Michael Fitzgerald, since deceased. No exemplification was produced, and it was proved that no trace of such a patent ever having been sealed, could be found in the office of the secretary and registrar of the province, nor any trace of a description for the lot having been received by the secretary from the surveyor general's office. In further answer to the defence, the lessors of the plaintiff proved that James Fitzgerald had died about two years before the patent was sealed, and therefore the title never passed from the crown. The learned judge directed the jury to find for the plaintiff, but also to find the length of the possession of the defendants, and those under whom they claimed, of the premises in question. The jury found for the plaintiff, and that the possession had been uninterrupted for twenty years before the passing of 4 Will. IV., ch. 1, but they did not find whether a prior patent had been in existence or not, nor was that point expressly left to them.

J. H. Cameron having obtained a rule nisi to set aside the verdict, as being contrary to law and evidence, and for misdirection;

Adam Wilson shewed cause. The defendants must rest their right to relief from this verdict upon the case of *Doe Watts v. Morris*, (a) but that case when carefully investigated will prove nothing in their favour. It is true that at first sight it would appear to support their view, but its circumstances are widely dissimilar from those before the court here. The Court of Common Pleas there certainly did incidentally state that an adverse possession of twenty years would prevent the grantee of the crown from bringing an ejectment, but that point it was not necessary to determine in the final settlement of the case, which was decided upon other grounds, totally independent of any question of possession. Then the defendants cannot rely upon the real property act, (b) as part of the seventeenth section of that act makes clearly against them, as it is expressly declared "that until the person deriving title to land in this province as grantee of the crown, or his heirs or assigns, or some or one of them, by themselves, their servants or agents, shall have taken actual possession of the land granted, by residing thereupon or cultivating some portion thereof, the lapse of twenty years shall not bar the right of such grantee, or any person claiming by, under, or through him, to bring an action for the recovery of such lands, unless it can be shewn that such grantee or person claiming by, under, or through him, while entitled to the land, had knowledge of the same being in the actual possession of some other person, not claiming to hold by, from, or under the grantee of the crown (such possession having been taken while the said lot was in a state of nature), in which case the right to bring such action shall be deemed to have accrued from the time such knowledge was obtained." There is nothing contained in this clause, which can upon the evidence be made favourable to the defendants, on the contrary it makes against

(a) 2 Bing., N. C., 189.

(b) 4 Will. IV., ch. 1.

them, and by no possible construction can the statute be beneficially applied to them.

J. H. Cameron in support of the rule. The jury having found a possession that would have been adverse against a subject, and barred his right to maintain an ejectment, neither the crown nor its grantee can maintain ejectment without proceeding first by information of intrusion, or at any rate without proving the title of the crown to the land in question, in the same way as would be required if the proceeding by information had been adopted. It is true that by the nullum tempus act (*a*) the crown's right is not barred in toto, until after a lapse of twenty years, but it is equally true, that by another statute (*b*), where a defendant in an information of intrusion has been in possession of the land for twenty years adversely to the crown, he cannot be turned out until the title be "tried, found, or adjudged for the king." The language of that statute is, "Wherever the king, and such from or under whom the king claims, and all others claiming under the same title under which the king claimeth, shall have been out of possession by the space of twenty years, or shall not have taken the profits of any lands, &c., within the space of twenty years before any information of intrusion brought or to be brought to recover the same, that in every such case, the defendant may plead the general issue, if he shall so think fit, and shall not be bound to plead specially; and that in such cases the defendant shall retain the possession he had at the time of such information exhibited, until the title be tried, found, or adjudged for the king." The possession of a defendant in an information of intrusion is not to be disturbed, where it has been adverse for twenty years, without the title being found in the crown; and why should a different rule hold, because instead of being by information, the proceeding is by ejectment. If the title should be adjudged for the king in the one case, it ought also to be in the other, before either the king or his grantee can disturb the possession. That is the view which seems to have been taken of this statute in *Doe Watts v. Morris* (*c*), and which is confirmed by the attorney-general having afterwards proceeded by information of intrusion when the ejectment had failed, and having had the title of the crown tried and proved.—*Attorney-General v. Parsons* (*d*). The statute 21 Jac. I., ch. 14, admits that there may be a possession adverse to the king; and however such admission may militate against the common law rule, that the king cannot be disseised, or that there can be no adverse possession against him in a subject, yet both by that statute, and by 9 Geo. III., ch. 16, that common law rule is clearly destroyed. Then, by the adverse possession here, the king had only a right of entry, which could not be conveyed by his grant without special words, and no special words are used. In *Viner's Abridgement* (*e*) we find it stated: "It is said, that the king may by special words grant a right of entry and real action, but it must shew how the right of entry is," while elsewhere it is doubted whether the king can grant a right of entry at all (*f*). This grant is therefore of no effect, because admitting that the

(*a*) 9 Geo. III., ch. 16.

(*c*) 2 Bing., N. C., 189.

(*b*) 21 Jac. I., ch. 14.

(*d*) 2 M. & W., 23.

(*e*) 17 Vin. Ab. 79; *Prerog. G.*, b. 3, 88; 3 *Lev.* 135.

(*f*) 11 Co. 12; 3 *Leon.* 198; *Vin. & Bro. Ab. Patent.* pl. 98; *Chose in Action.* pl. 14.

king can grant a right of entry, still it can only be by special words, and as in this case only a right of entry remained in the crown, the grant conveys nothing to the grantees. Then, again, there was a prior grant for this same land; and although it is alleged that the grantee in that grant was dead before it was issued, yet that is a fact that should have been found by the jury. As it now stands, there was a prior grant, and no finding as to his being alive or dead at the time that the grant was made; and even supposing him to have been dead, yet it may be questioned whether the grant to him and his heirs would not have been good, in the same manner as a deed to the heirs of A. B. will convey an estate to them, A. B. being dead (*a*). But supposing that no prior patent ever existed, yet the ancestor of these lessors was the grantee of the crown, in the same sense in which the word grantee has been construed by this court in reference to the sales of land for taxes; and as the Real Property Act speaks of the grantee of the crown, not after grant or patent issued, but merely as grantee of the crown, the same construction that would make his lands liable for taxes before the issuing of a patent for them, would allow an adverse possession against him before any grant was made and sealed.

ROBINSON, C. J.—The plaintiffs' title in this case was a perfectly clear one: they produced letters patent from the crown of a recent date, 13th of October, 1842, granting the premises to them in fee. The first question is, whether the defendants repelled this title by the proof which they gave or attempted to give of a patent having issued at a very early day to the original nominee, James Fitzgerald, for the same land. I am of opinion, that nothing appeared on the trial respecting this alleged prior patent, which ought to have impeded the plaintiffs' recovery. In the first place, there was not such evidence adduced of the existence of a prior patent, as ought to be taken as sufficient for establishing the fact. The statutes 3 & 4 Ed. VI., ch. 4, and 13 Eliz., ch. 6, make the exemplification of the letters patent equally good indeed with the patent itself; and it has been held, that these statutes extend to patents granting lands, &c., as well as to those which confer franchises or privileges. We know that the constant course in this province is, to enrol or register all such patents; and where a person rests his title or defence under an alleged patent, we must hold him to produce it, or an exemplification of it, or at least an examined copy from the enrolment. It is said, that such proof in this case was impossible, because no registration of this particular patent can be found in the proper office. If that were conclusively made out, it would raise a very strong presumption, that no such patent can have issued; though we must admit the possibility of a patent having been sealed, and by some inadvertence issued without its having been ever recorded. If the patent so said to have been issued were produced, that must of course put an end to all doubt on the subject; but when that cannot be done, surely the next step is to shew conclusively to the court, that the next best evidence of the existence of such a patent is not within the power of the party, before we should venture to allow the title of a person claiming under a patent, which he does produce, to be defeated by a verbal account of a prior patent to another party, in regard to the

(*a*) 4 Cruise. Dig. Deed, 263.

existence of which, as well as its contents, we are called to depend upon the memory and verbal accounts of witnesses. We must see in a moment how dangerous it would be, if in any and every case (for we should have no authority to limit the reception of such evidence for the purpose of annulling a patent issued under the Heir and Devisee Acts) a party proving title under a recent grant from the crown were liable to lose his estate, upon a suggestion that many years before somebody had seen a patent granting the same land to some other person; which patent, however, could not be produced, nor any trace be found of it in any of the proper offices of the land-granting departments through which it must have passed; no account of it, in short, but a witness or witnesses' depositions, that they remembered having seen such a patent more than twenty years ago. When we consider the danger of such evidence, arising from the fallibility of memory and other circumstances, how difficult, for instance, it must be for the witness or witnesses in this case to recollect distinctly that the parchment they have in their mind had a seal attached to it, and was a perfect instrument, and that it certainly granted this particular land in fee to the person they speak of; we cannot but be convinced how necessary it is, for the protection of all men in their estates, that extreme caution should be used in receiving such evidence, and in giving it effect. In my opinion, before it could be properly received in any case, much more satisfactory evidence ought to be given of a thorough search of the public offices, and of the non-existence of any record of such a grant therein, than was given in this case, in order to lay the foundation for receiving parol evidence of the existence and contents of the alleged patent; and if the very minute search which ought to be made in the proper offices failed in discovering any trace of such a patent having been completed, then although parol evidence may and must be admitted, and although it is not for the judges to dictate in terms to a jury what weight they can safely give to such evidence as they are required to hear, yet I confess I think it necessary, for the protection of all men in their right of property, that a jury should look at such evidence with a strong impression upon their minds, that it should be so free from suspicion or doubt as to leave not a question of the truth of the fact remaining, before they should feel it safe and proper to give effect to it. We all have some recollection of a case, in which a person claiming under a recent patent in this province, was opposed by proof of a prior patent, which by some accident had not been recorded, and of the existence of which the government was unconscious; but there the old patent was actually produced; there they were not required to find a fact so entirely out of the ordinary course, upon the mere verbal account of witnesses. Where conveyances between man and man are to be proved, if the deed has been lost, we know how strict the law is in requiring an account of the subscribing witnesses: they must be produced if they are living, and within the jurisdiction of the court, otherwise their handwriting must be proved, for the law requires proof that such a deed as that spoken of was really executed, not merely that such an instrument was seen by a stranger. How fearful a thing would it be thought, if when a plaintiff in ejectment had made out a clear title under a conveyance from the former owner of the estate, he were liable to have his title set aside because the defendant could produce one or two persons who would

swear, that many years before, they had seen a deed by which the said former owner of the estate had conveyed the same lands to another, without the execution of such a deed being proved by any subscribing witness, or without any evidence or trace of the fact of such a deed being made, except this declaration of some person who had seen it. Yet what more does the evidence in this case amount to? There is just this difference and no other, that the great seal proves itself; and one of the witnesses, speaking from a recollection of twenty years, says he believes the patent had the great seal to it. But we know, in this particular of seals to old patents, how uncertain a reliance can be placed even on what we see; and besides, though it is true that the great seal proves itself, so that the court are bound to recognize the true seal, yet when they had it not submitted to their inspection, they must depend upon the accurate knowledge and recollection of a witness speaking after a great lapse of years; and they are asked to place implicit credit on his impressions, though all the usual public confirmations are wanting, of the crown having ever placed its seal to such a patent. In this case it was shown, that no trace could be found of a description of this land having ever come to the secretary's office. We know that patents, when sealed, were entered at the auditor general's, and afterwards recorded, each step thus taken in any of the public departments affording means of proving whether a patent for any particular land had been sealed; and surely it ought to be very strong, if not conclusive proof, that no such patent as is alleged has been sealed, where not only none such can be produced, but where all this evidence, which it is the business and common course of the public departments to afford, is wanting. How else is the owner of an estate, derived from the crown, to be adequately protected, if he may be dispossessed upon the testimony of any witness who can be brought to say that he once saw a patent for the same land older in date, without any other proof of such a patent having in fact been sealed, than the recollection of the witness that he saw a seal appended to it, which he took to be the great seal. We must ask ourselves, whether such a course would afford adequate protection against the setting up a fabricated patent? Nothing we know could have been easier formerly, than to obtain one of the printed blank forms; nothing more would be necessary than to fill it up with a lot and grantee, after adding certain signatures, which would probably never be inspected or noticed, and of which people in general would not be competent judges; append to it a great seal, such as may be found in almost every house, and then let persons see it in its apparently perfect state, with a view some years after to establish it as a real patent, upon their oath that they had seen it, and evidence that it had been lost or mislaid and could not be produced. What a jury might do, without absolutely violating any principle of legal evidence, in giving effect to such proof of a prior patent as was advanced in this case, is, in my apprehension, a question not free from doubt and difficulty; but I have a very strong impression, that what they ought to do would be, to refuse to be satisfied of the pre-existing grant, without more being shewn than was shewn in this case. They would be more safe, I think, in concluding that the witnesses, speaking as they did from memory only, might have been imposed upon and been mistaken, than that the government had departed in this particular instance from their constant course. It was not necessary to the deter-

mination of this case, that I should have gone so particularly into the considerations of this point ; but I have done so because I felt, that the considerations it involves are of much consequence to the community. Upon the other facts, as they stand admitted in this case, it would do no injury, in my opinion, to the plaintiff's case, to assume that that was a genuine patent which the witnesses swore they had seen more than twenty years ago, and by which the premises in question were granted by the crown to one James Fitzgerald, and there can be no doubt the witnesses believed the fact to be as they represented it. This James Fitzgerald was the original nominee of the crown for the land, the same person of whom the commissioners under the Heir and Devisee Acts have adjudged the lessors of the plaintiff to be the co-heiresses. It was clearly proved at the trial, and is not disputed, that he had been dead a year and more before the supposed patent was sealed. Under such circumstances nothing could pass under the grant ; though it was contended, but I apprehend not seriously, that the grantee being dead before the patent was sealed, his heirs received nevertheless title under it. But it was further urged, that supposing nothing to have passed by the grant, yet that the bare fact of the patent issuing, even to a person dead at the time, would of itself disable the commissioners from making an allowance in favour of the heir of the original nominee, because the statutes enable them to report in favour of the heirs or devisees of the nominees of the crown only in cases *where no patent hath issued for the lands.* Here a patent had issued, the defendants argue ; and admitting even that it was inoperative, it still has the effect of depriving the commissioners of jurisdiction. We are not warranted, I apprehend, in considering that the issuing of the old patent spoken of was found by the jury or that they were satisfied on that point ; for upon the recommendation of the learned judge, they found a verdict for the plaintiffs, in a view taken of the case which was independent of that fact. But if they had been convinced that a patent had really issued in the name of James Fitzgerald, though long after his death, that, in my opinion, would have been no reason why they should have found a verdict for the plaintiffs. Their title, under the patent made to them in 1842, would not, as I think, be at all affected by it. To make a patent valid, or a deed valid for assuring land, there must be parties capable of taking under it, otherwise the patent or the deed is void, and an absolutely void patent is not such a patent as can deprive the commissioners of their jurisdiction ; it would be strange, indeed, if it should have that effect, for the obvious and necessary intent of the statutes, is to afford a tribunal for determining to whom the crown shall grant an estate, as representing the party to whom its pledge had been given, but who had died without receiving the estate. Where the crown has already divested itself of the estate, there remains no question for such a tribunal to determine ; but where the estate continues vested in the crown, it must continue to be necessary to determine who is the party that can justly claim the fulfilment of the promise, as representing the original object of the bounty of the crown. No other provision has been made than through this commission, and we must see quite clearly that the question of jurisdiction must turn, not upon the fact whether the crown may have vainly attempted to divest itself of the estate, before the commissioners are asked to adjudicate upon the claim, but whether it

has in fact done so. That could never be recognized as a patent, which under the Heir and Devisee Acts can estop the commissioners from entertaining a claim, while at the same time it must be held not to be a patent effectual for passing the land, but an instrument wholly null and void, by reason of the death of the intended grantee before it was sealed. We have, as judges of this court, been long acting as commissioners under the Heir and Devisee Acts, and we have judicial knowledge that wherever a patent has been made out to the original nominee after his death, the heirs of such nominees have felt it necessary to claim before the commissioners, and that they have constantly had their claims allowed and acted upon, and have received, as the heirs of James Fitzgerald have in this case, a patent, upon the commissioners' report, notwithstanding the issue of the former patent, which in consequence of the previous death of the grantee would not operate upon the estate. There have been a multitude of such cases; the law has been in constant operation for more than forty years, the judges of this court having been always members of the commission. The words—"in cases where no patent hath issued for such lands," have been always held by them to mean no patent which has had the effect of divesting the title from the crown; and they have again and again determined that the issuing of a patent to a nominee after his death, which has in many cases happened, and of course always from accident and in ignorance of the fact, was no impediment to their receiving a claim and reporting in favour of the heir. They usually, at an early period at least, went through the form of cancelling the void instrument that had issued; but this has not been uniformly done. We cannot hold that our predecessors were not well able to construe these statutes, or that we are at liberty to treat their construction as not binding upon us; on the contrary, the contemporaneous construction of a statute has always great weight, and very properly; we have followed it in a long course of proceeding under these statutes, and it is impossible to tell how many estates, and of what value, are now held under titles, which a new construction, such as is now contended for, might disturb; and for my part, if I were inclined to doubt the correctness of the former construction, I should still hold it to be my duty to abide by it. But I do not doubt that the construction which has been acted upon hitherto is the right one, and that the patent erroneously issued in the name of the original nominee, after his death, is no impediment. I should have thought so, if the question had depended wholly on the sense in which we must have understood the words which I have cited from the preamble of the statute 45 Geo. III., ch. 2. But when we go further into the act, it is impossible any doubt can remain; for towards the end of the first clause, it is expressly declared that the commissioners are to entertain "cases brought before them respecting lands within the province, where the nominee or nominees of the crown to those lands is or are dead without having obtained his Majesty's letters patent for the same in his, her or their life times." It surely cannot be said that James Fitzgerald obtained the patent for this land in his life time, for it was not made out till long after his death; this makes an end of any question connected with this patent, which need not, as I view it, have been gone into any further than by referring to these words; but as the litigation is about a valuable property, and the matter was

earnestly argued, I have been led further than was necessary in examining it. And indeed, it seems evident on a little reflection, that greater stress was laid on this alleged fact of the issuing of a prior patent than, under any view of it, it was capable of bearing. If it had been made out beyond all doubt that a patent had been issued five-and-forty years ago, professing to grant these premises to James Fitzgerald and his heirs, long after he was dead, it is very certain such a patent could have vested no interest in him; and if it could have carried the estate to his heirs, it is not denied that the lessors of the plaintiff are those heirs. If, on the other hand, it be evident that the heirs of Fitzgerald could take no estate under the patent made to him after his death, and that the land therefore continued vested in the crown after that patent had been issued, precisely as it was before; then must it not follow that the patent under which the lessors of the plaintiff claim takes effect, for surely her Majesty could legally grant in eighteen hundred and forty-two the estate which she was then seised of. The patent could at least be none the worse for being in accordance with the commissioners' report. It may, to be sure, be objected that, *debile fundamentum fallit opus*; and that if the commissioners' report, from want of jurisdiction, must fall to the ground, the patent, which has been confessedly issued in confirmation of that report, must fall with it. The discussion of this point might be carried to a considerable length, but it would be idle to enter into it under all the circumstances of this case. For the reasons I have stated, I consider that the title of the lessors of the plaintiff is not invalidated by the attempt made to shew the issuing of a former patent, and that the verdict which has been rendered for the plaintiffs is not open to exception on that ground. It has been urged, however, that the defendants shewed upon the trial other sufficient reasons why the plaintiffs were not entitled to recover. They proved, and I think satisfactorily, that at least from 1816 down to the present time, there has been an uninterrupted possession of the premises held by persons not acknowledging the title either of the crown or the lessors of the plaintiff; and they claim as the persons at present holding possession in privity with those who have occupied since 1816, that they have good title under the statute of limitations (that is, under statute 4 Will. IV., ch. 1.) But I am of opinion, that the title of the lessors of the plaintiff cannot be resisted on that ground. In arguing this point, I think the alleged issuing of the old patents was not treated as a fact that could affect it, and it is clear that it could not; for were it true, as was contended in another part of the argument, that that patent could have the effect of vesting the estate in the heirs of James Fitzgerald, the statute could not run against them, so long as they all remained beyond the seas. But this view of the case may be safely put out of the question; for it is too clear to admit of argument, that the heirs of Fitzgerald could take no estate under such a patent as that which was attempted to be set up, and consequently that nothing passed by it—*Goodright v. Night* (*a*). To enable a patent or a grant by any form of conveyance to operate, there must be a grantee in esse capable of taking. The same law in this respect prevails with regard to deeds and devises. A grant to A. B. and his heirs, or a devise to A. B.'s heirs, passes nothing

immediately to the heirs; they can only take by inheritance, after the estate has vested in A. B.; the words "his heirs" are not intended to be, nor can they be taken as a descriptio personæ; but they are words of limitation to denote the nature of the estate intended to be granted or devised to A. B. The heirs in neither case take as purchasers, but by the descent through the ancestor, in whom therefore the estate must first have vested. And, consequently, if the person named as grantee is dead when the deed is made, or if the devisee dies before the will can take effect by the death of the testator, nothing in either case passes. The question has been formerly much agitated in respect to devises, and especially of estates in tail—*Hodgson v. Ambrose* (*a*). The point is free from doubt either as to the law or fact, that up to the issuing of the patent to the lessors of the plaintiff in 1842, the estate in these premises was in the crown. It is a clear consequence of this, that the statute of limitations did not run during that period. In many cases that arose in Upper Canada before the passing of the act 4 Will. IV., ch. 1, full effect was given to the acknowledged maxim of *nullum tempus occurrit regi*; and it has been repeatedly held, that twenty years' possession before the land had ever been granted away by the crown, could give no title under the statute of limitations 21 Jac. I.; and the propriety of these decisions has not been questioned, and indeed could not be. They proceeded, no doubt, upon the principle that an adverse possession was necessary to confer a title by lapse of time; and that no one can in law be said to have disseised the king, who is looked upon as being always in possession of his estates; and indeed the statute 21 Jac. I. has never been held to apply to the crown. Nor can our statute 4 Will. IV., ch. 1, sec. 17, have any more application to estates vested in the crown than the statute 21 Jac. I. had; the words indeed exclude the application, as well as the common law principle, that the rights of the king are not bound by a statute in which he is not named. But the defence has been rested rather on this ground (which, however, does not seem to have been distinctly taken at the trial); that by the long possession held against the crown the queen was disabled in 1842 to grant an estate in possession; that it was necessary first to dispossess those holding against the crown, for that the queen's patent will not pass the title during such an adverse possession as was shewn in this case. If there are authorities to support this position, they are certainly not to be found in those text writers or reports of adjudged cases from which the principles of the English law were to be gathered at the time that we adopted it, nor for a long series of years following that adoption. The principle, on the contrary, was to be found everywhere uniformly stated and plainly recognized, that the king could not be dispossessed; that an intruder upon the crown consequently gained no estate or interest by his possession; that the crown could grant the land as freely as if no such intruder were upon it; and that the grantee of the crown, in such a case, would by force of his grant be seised of an estate in possession in the eye of the law. It has been so held constantly in this country; and it is fit we should consider that the circumstances of a new country are certain to call much more frequently than in England for the application of these principles, so that

(a) Doug. 347, and cases there cited.

they necessarily affect a much greater number of cases; and the way in which they are understood by the public and applied by the courts, becomes a matter of infinitely greater importance here than in England. An intruder upon crown lands in England is not likely to remain long unmolested; for the fact of his intrusion can hardly escape attention, nor would it be likely to be tolerated for any length of time. We should find few occasions for applying the law to the case of squatters there. In this country, on the contrary, the cases are almost without number, where persons having no right and pretending none, have, as it suited their convenience, seated themselves in the waste lands of the crown, being either content to stay only so long as the land should remain ungranted, or hoping to obtain it from the crown at some future period when it may be thrown open to grant, or relying upon being able to come to some terms with any grantee who may agree for it from the government. Now, when I state it to be notorious that, in the multitude of cases (not hundreds, but perhaps thousands) in which lands have been so occupied, the crown has never hesitated to grant them by patent to others in the same manner as if no one had trespassed upon them, I state what I consider to be very strong ground against the adoption now for the first time of a new principle in this country, which might be found to invalidate the title to a vast number of estates. But, in my opinion, the reason against the adoption of such a principle becomes infinitely stronger if not irresistible, when we take into account what we all know, that this doctrine upon which the crown has acted always, and without hesitation, has been frequently brought under the notice of this court, and constantly and invariably confirmed from the earliest period. And it has not been only in cases where the occupants have been mere squatters (to use a popular term well understood here), pretending no claim; that the law has been so understood and applied; it has been held to prevail equally and of necessity in cases where a party has gone into possession with a fair ground for expecting that his title would be confirmed, either on account of some contract he had made with the person to whom the government had located the lot, or on any other ground. In my early practice at the bar, I have known some such cases where the operation of the rule seemed hard, and certainly afforded to the person who had obtained a patent the means of taking an unconscientious advantage, and sometimes of an accidental circumstance. But the court have always felt themselves driven to admit, that in courts of law at least the effect of the patent was in such cases not to be denied; and feeling this, they have had the firmness not to allow "hard cases to make bad precedents," being well aware of the inevitable inconvenience which must follow from any other course. In this spirit the law has been constantly applied in these cases, by our predecessors in this court, and not less so by ourselves. I know of no one instance where the principle referred to has not been supported. If it be imagined, that the law has, during the whole period, been misapprehended, and that all this has been done in mistake, then in justice at least to those whose opinions we have followed, I think it worth while to remark, that in the older British colonies on this continent, and equally in the United States of America, and since the same territories ceased to be colonies, the same doctrine, confessedly deduced from English authority and the English common law,

has been consistently maintained by judges of great eminence, and under circumstances, too, precisely such as are so frequent here; for the same state of things has afforded the same occasions for resorting to the doctrine in question (*a*). It is a maxim that pervades our law, that upon questions that affect the tenure and transmission of real property, it is of less importance that the principles which are maintained should be strictly correct, than that they should be well settled and known. Lord Mansfield expresses this sentiment strongly in *Hodgson v. Ambrose* (*b*), when he says, referring to a case of *Coulsar v. Coulsar*,—"Since this is literally the same case with *Coulsar v. Coulsar*, and that has stood as law for so many years, it ought not now to be litigated again; it would answer no good purpose and might produce mischief. The great object in questions of property, is certainty; and if an erroneous or hasty determination has got into practice, there is more benefit found from adhering to it, than if it were to be overturned." Now it is impossible that any principle can be said to be well known, so long as it is fluctuating and uncertain. If any point can be held to be settled in this country by the decisions of this court, then we must, I think, admit this point to be settled, that the crown can make a grant of its land notwithstanding an adverse possession, the king being incapable of being disseised. It is impossible for any of us to say, what number of grants which have heretofore been made, may depend upon this principle being upheld, but I am sure there must be many. The principle, that an intruder upon the crown gains no estate or interest by his intrusion, is the foundation of the doctrine; and it is certainly to be met with in books of the highest authority, where it appears always to be laid down without question. In England, where perhaps from the nature of things occasion may not arise for applying this principle more than four or five times in a generation, there may be found less hesitation in the courts in yielding to a desire to relax it, when it is seen that to follow it out in all its consequences would produce hardship, as it sometimes might. In this country, we cannot but feel, that great inconveniences and confusion might ensue, if we were to depart from former decisions, and unsettle a principle upon which, from particular circumstances, so many titles may depend. *Harper v. Charlesworth* (*c*), is one of those cases in which the Court of King's Bench in England has been considered to have shewn a tendency to relax the principle I refer to, but when its circumstances are examined, it does not seem to be open to that construction. The court then were asked to strain the principle to an unreasonable extent; and while they refused to do so, they were studious to shew, that they were not, in their opinion, over-ruling the current even of ancient authorities; though they evidently felt, that the judgment they were pronouncing might be looked upon as departing from principles which had been hitherto maintained. But there is nothing in *Harper v. Charlesworth* which supports what this defendant has contended for. The point urged then was, that an intruder upon the lands of the crown could in no case maintain trespass, even against a stranger; a principle which certainly is not without authority to support it, but which it would have seemed monstrous to push to the extent it

(*a*) See Notes to Adam's *Eject.*, American Ed., 46.

(*b*) *Doug.*, 326. (*c*) 6 *D. & R.*, 572.

was sought to be carried in that case. The plaintiff had held some woodland allotments in Needwood Forest, paying a nominal rent to the king of twenty shillings a year; but because the regulations of the Needwood Forest Act, 1 Anne, c. 1, s. 7, had not been complied with, which imposes certain restrictions upon leases, it was contended that the plaintiff could not be regarded as holding any legal interest under the crown; that he was therefore an intruder, and could not maintain trespass against a stranger who had interfered with his possession. The court admitted, that for the reasons stated, the possessor had no legal title against the crown, and that the crown could at any moment remove him from the possession which he had enjoyed, paying rent; but they denied that he was an intruder, "*because he had come into and continued in possession with the full consent and concurrence of the crown,*" and they said it was desirable that the party whom the crown permits to have the actual occupation of lands should have the power of calling to an account any individual who trespasses upon them, for otherwise the property would be exposed to every species of inroad or trespass, which would pass unpunished, except the crown thought proper to interfere by resorting to its prerogative process." There is surely nothing in this case, when its circumstances are considered, that would authorise us to hold, that a person, having intruded on the lands of the crown, without the consent, or privity, or even the knowledge of the crown, can, by such intrusion and by mere lapse of time, acquire a legal seisin in the property, so that the Queen must be regarded as disabled, like a person disseised, from granting the property till the intruder has been dispossessed. The case before us is clearly distinguishable from those cases which have arisen in England, where lands have escheated to the crown, but where the king's title must first be found and placed on record through an inquest of office, before the estate can be properly granted by letters patent. There is no analogy between the cases. *Doe v. Redford* (*a*), fully explains the difference, which arises from the statutes 8 Hen. VI., ch. 16, and 18 H. VI., ch. 16, passed for the express purpose of restraining the crown from making grants or demises of lands escheated "before inquests and verdicts be fully returned into the Chancery or Exchequer." In *Bac. Ab. Prerogative* E. 6, it is thus laid down,—"So there can be no tenant at sufferance against the king, but he who holdeth over is an intruder, because no laches can be imputed to the king for not entering. Therefore, if the king be seised in fee of the manor of B., and a stranger erect a shop in a vacant plot of it, and take the profit of it, without paying any rent to the king, and after the king grant over the manor in fee, and the stranger continue in the shop and occupy it as before, this is no disseisin, but an intrusion on the king's possession, for that the king's title appears on record; the entry in pais, which is not an act of equal notoriety, will not divest it out of him: if, then, the king is not disseised, his conveyance of the freehold is good, and the grantee is seised by virtue of it, and consequently cannot be said to be disseised by the stranger who has made no entry on him after the king's conveyance, but only continued the old interest which he had before the grant, and so remains an intruder still, and liable to an action of trespass or ejectment for it."

Nothing can more

precisely meet the case before us than this statement of the law by C. B. Gilbert, for which he cites Bro. Disseisin 4, Hob. 322, Rolle. Ab. 659. It does not appear to me that our statute 4 Will. IV., ch. 1, sec. 17, which was referred to in the argument, can have had the effect of placing the defendant's case on any stronger ground; as regards the old statute of limitations 21 Jac. I., ch. 16, it had always been held that the king was not bound by it. The cases in which grants from the crown have been presumed, as in the case of the Mayor of Hull *v.* Horner (*a*), after an enjoyment of 350 years, proceeds upon grounds wholly independent of the statute of limitations. I take it to be quite clear that upon the same legal principles which were constantly applied in regard to the statute 21 Jac. I., ch. 21, the king is not bound by our statute 4 Will. IV., ch. 1 sec. 17. That section as I consider has made no change in the law that can affect the crown. Indeed independently of the principles of the royal prerogative, the terms used cannot be so construed; no time ran then in favor of these intruders, while this estate was in the crown, which it was in March, 1842, when it was granted to the lessors of the plaintiff. From that moment no doubt the statute would begin to run, but what then was there to disable the queen from granting in March, 1842. I can find no authority except one very modern case (*b*), to which I will refer, which would warrant the entertaining the presumption of a grant from the crown to a mere intruder who had been twenty years in possession; and I see no other ground on which the defendant's case could possibly stand: though the statute of limitations I am persuaded can have nothing to do with this case, so far as regards any direct legal application to it, yet it is material to consider the proviso referred to in the argument which our legislature, in adopting the enactments of the new statute of limitations in England, have thought it right to engraft upon it; it is this, "Provided always, that until the person deriving title to land in this province as the grantees of the crown, or his heir or assigns, or some or one of them, shall have taken actual possession of the land granted, by residing thereupon or by cultivating some portion thereof, the lapse of twenty years shall not bar the right of the grantees or any person claiming by, under, or through him, to bring an action for the recovery of such lands, unless it can be shewn that such grantees or person claiming by, under or through him, while entitled to the land had knowledge of the same being in the actual possession of some other person not claiming to hold by, from or under the grantees of the crown, such possession having been taken while the said lot was in a state of nature, in which case the right to bring such action shall be deemed to have accrued from the time that such knowledge was obtained." It seems indeed to me from this clause, that the legislature could not have regarded the mere squatter upon the ungranted lands of the crown, as acquiring by his occupation after twenty years, any right against the crown, for they could not have designed to place the subject in a more favorable footing than the sovereign. They have thought it unsafe and unjust to let any lapse of time give a title to a person who unobserved steals upon waste and ungranted lands, pretending no claim to it, but merely waiting till the owner may learn the fact of his occupation, and take measures to dispossess him. They considered that the crown's

(*a*) Cowper, 110.

(*b*) 2 Bing., N. C., 198.

grantee might often be in ignorance of the fact of such occupation, as is no doubt actually the case in hundreds of instances, and they thought it prudent to make allowance for that probability. But they surely could not mean to exact from the crown a more minute vigilance in guarding its rights than they were requiring from individuals. That would be contrary to the well known maxim which imputes no laches to the king, because it supposes him too much occupied in affairs of state to exercise a jealous vigilance over his rights. Under this proviso the grantee of the crown would not lose his estate by a trespasser continuing upon it more than twenty years, unless he could be shewn to have been aware of such occupation. Can we then suppose that the legislature imagined or intended that the crown was to lose its estate, by reason of an occupation under circumstances exactly similar? I think it reasonable to hold, that the legislature have in this proviso recognized it as a principle, that there cannot reasonably be said to be any dispossession of waste and ungranted lands of which no one claiming title has ever yet taken possession. The mere occupation of the trespassers under such circumstances, bears some resemblance to the kind of possession or occupation of the wilderness held by the hunter or by the animal he hunts; unless some one deriving from the crown a legal title to the soil is in a condition to set up a conclusive right, and has notice that it has become necessary for him to assert it.— It is true that the premises happen to be a town lot in the town of Niagara, and not a lot covered with wood in a remote township, but the statute has drawn no distinction, nor can we upon any legal principle attempt to balance probabilities of notice, or draw different inferences with respect to different portions of the crown lands which have never yet been reduced to possession under a grant from the crown; they must all be governed by the same rule, we have no authority to say otherwise. In addition to these arguments, I think the whole scope and objects of the Heir and Devisee Acts, are quite inconsistent with the notion that after the crown has made its patent upon the commissioners' report, it can be held to be of no validity, because some intruder had been twenty years on the land before such patent issued. That would be repugnant to what we know to have been constantly done by ourselves and other judges acting judicially in the heir and devisee commission, for the commissioners frequently report in favor of a claimant for land of which they see upon the evidence that some other persons have been twenty years in possession. If a grant might be presumed in such cases, the notice of claim is noticed to the occupant to advance his pretensions. The statute gives full power to the commissioners, to direct a patent to issue where none has issued before; and where none is heard of while the case is before them, and they report in favor of the heir of the locatee, it would be strange if the patent issued on their report, which the statute declares shall be final, were liable to be defeated by a jury, afterwards presuming a prior grant, in order to confer a title upon an intruder. As it is clear that the crown is not bound by the statute of limitations, the defence, I apprehend, can only be rested on the ground, that under the circumstances of the case, a grant from the crown to the person under whom the defendant derives his claim to take possession, should have been presumed, and that the learned judge at the trial, ought to have recommended to the jury to find such a grant, though no evidence of it was given, and that the verdict should

be set aside, in order that a jury may be so directed upon a second trial. But I believe it is a new idea in our law, and one that in this province might be rather alarming, that a grant from the crown should be presumed, in order to confer a title upon an intruder, after twenty years' possession, and where nothing more appears, than must appear in every case of an unauthorized occupation of unconceded lands. In the case of the Mayor of Kingston upon Hull *v.* Horner, Lord Mansfield delivered an elaborate judgment in support of the principle which he there laid down, that a charter or grant from the crown, may be presumed after a long uninterrupted enjoyment. And in that case he held that an enjoyment for 350 years would support the presumption of a grant. The objection urged was, that to prevail against the crown upon the new footing of enjoyment, the time must be carried back beyond the period of legal memory, but Lord Mansfield held, that "all evidence is according to the subject matter to which it is applied; that in case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right. But length of time, used merely by way of evidence, may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other, according to the circumstances." His lordship mentions a case which had been tried before him, before the nullum tempus act (*a*), where the "evidence in support of a title was a possession and enjoyment of a hundred years; and he held that, though such possession and enjoyment could not conclude as a positive bar, because there was no statute of limitations against the crown, yet it might operate as evidence against the crown of right in the defendant, if the claim could have a legal commencement, though such commencement could not be shewn. In questions of this kind," his lordship says, "possession goes a great way; but there is no positive rule which says that one hundred and fifty years' possession, or any other length of time within memory, is a sufficient ground to preserve a charter." Now, applying these principles to the present case, and taking also other cases—*Roe dem. Johnson v. Ireland* (*b*), and *Goodtitle dem. Parker v. Baldwin* (*c*)—how could it be held that the jury could be recommended to find a grant made by the crown, as the foundation of the possession held by this defendant, and by those under whom he claims, after we know that the crown had, before the commencement of any such possession, located this lot and given the promise of a fee simple to James Fitzgerald; that the ordinary and understood consequences of such location are, that the nominee is at liberty to take possession immediately, and that the legal consequences, assured by a positive act of parliament, are that the heirs of the nominee when he dies (which is the case here) can claim as of right a patent from the crown before a proper tribunal, upon proving their heirship. How can it be said consistently with what has been declared by Lord Mansfield in the case to which I have referred, that a jury could properly, upon a consideration of all the circumstances, presume a grant to these defendants or their predecessors in the occupation, when the making such a grant would have been a flagrant act of injustice on the part of the crown—a direct violation of the pledge given to the original nominee, under which these lessors of

(*a*) 9 Geo. III., ch. 16.

(*b*) 11 East., 282.

(*c*) 11 East., 494.

the plaintiffs claim, and therefore inconsistent with the honour of the crown. And how can it be said, upon anything that appeared in evidence, that the claim of the defendants could have had a legal commencement; when, to have made any such patent, would have been in direct contravention of the Heir and Devisee Acts, a stepping in by the crown between the location to the original nominee, and the legal effect which it is provided by law such location shall have in favour of the heir at law. It is natural in all these cases to consider that nothing can with any justice be inferred from the crown suffering the land to be occupied for twenty years or more; because their nominee receives by his location an equitable freehold, which entitles him and any person under him to possess the land and cultivate it. And the effect would be strange indeed if, after an occupation of many years, which the crown might most naturally infer to be the occupation of the nominee, or of some one holding under him, it were to be assumed by a jury as the foundation of a title adverse to the nominee, on the supposition that the crown had been unfaithful to its promise, and had done that which in an individual would be regarded as fraudulent. Would it be reasonable in a jury, if it could be competent to them, to entertain the presumption of a grant adverse to the former pledge of the crown, when the proper tribunal, clothed with ample powers by act of parliament, have decided in 1842 that no patent had ever issued; decided, too, after notice given to all persons to advance their claims, and when the effect of their decision, it is expressly declared by statute, shall be final. I have referred to a case decided within a few years in England, which was cited in the argument, and which it is necessary to consider with attention, because it was much relied upon, and is indeed the only authority which seems to afford a semblance of support to the defendants' case; and because the doctrine which it is assumed to have established would in this country, as I apprehend, have an application more extensive and important than can be easily foreseen. I allude to the case of *Doe Watts v. Morris* (a). If that case has been correctly decided, and if the inference drawn from it in arguing the case before us, must be considered to be also correct, we may expect to find its authority often resorted to for establishing positions very much at variance with former decisions in this country, and I think I may also say in other British colonies. Without admitting its application to cases where patents have issued under the Heir and Devisee Acts, it would not improbably, I think, be appealed to in other cases; and as it seems to me the principle which it is at least supposed to have established, would lead to very unexpected consequences. The judgment I allude to was given in the Court of Common Pleas, in 1835, upon the following facts, stated in a special case. The manor of Iscoed, in Radnor, and the wastes within the same, had been in the possession of the king, who was seized thereof in the right of his crown, and the premises in question in the action of ejectment were waste lands within, and parts of the manor. In 1803, these premises were, without the leave of the king, taken in from the wastes and inclosed, and had been held and occupied from that time as enclosed land separate and divided from the waste lands of the manor, and no acknowledgment or

(a) 2 Bing., N. C., 189.

payment of rent was proved to have been made by the occupier. In 1826, the lessor of the plaintiff purchased the manor from the king, and received a certificate from the commissioners of his majesty's woods and forests, under the provisions of the statute 57 Geo. III., ch. 97, which certificate is set out in the case, and is in form prescribed by the statute as necessary for effecting the transfer. The declaration in ejectment was served in December, 1833. The question submitted was, whether the lessor of the plaintiff was entitled to recover possession of the premises on that ejectment. For the plaintiff it was contended, that the sale and conveyance by the commissioners, by the express provisions of the statute 57 Geo. III., ch. 97, placed the vendee in actual possession and seisin of the premises, and enabled him to hold the same as fully to all intents as his majesty might have done if such sale had not taken place; that the king cannot be dispossessed (in law) by the wrongful act of a subject; that as the defendant could not insist on his adverse possession against the crown at the time of the conveyance, neither can he now against the plaintiff. For the defendant it was conceded, that adverse possession short of sixty years will not prevail against the crown, but his counsel relied on the statute 21 Jac. I., ch. 14, and contended, that after twenty years' possession against the crown, the effect of that statute was to *disable the king from granting the estate*, until his title had been found by office; that the right of the crown in such a case, was *nothing more than the right to file an information of intrusion*, a right which could not be assigned, or at all events only by special words expressly granting it. They intimated that the crown is bound by the Statute of Maintenance, 32 Hen. VIII., ch. 9, as being a statute made to prevent fraud (which, however, the court seemed inclined to dissent from); that a subject (after twenty years' adverse possession) cannot bring ejectment; and that when the subject has no ejectment, the king is put to his office found. They contended also, that the court, after so long a possession, might presume a grant to the defendant, and that if the commissioners had a right to pass the waste lands in question by their certificate, they had not used the proper words for doing so. So far as we can judge from the report, the argument was not by any means an elaborate one, but the court took time to consider their judgment. The chief justice, Sir Nicholas Tindal, in delivering the judgment of the court, speaks rather in terms of hesitation of the opinions they had formed. "We think," he said, "upon the best consideration we can bring to this case, which is altogether new in its circumstances, that the inclosed parcels of waste which are the subjects of this action, did not pass from the crown to the purchaser, under the contract and certificate set forth in the special case." We must observe, that his lordship says, not that the crown could not by letters patent have passed the estate under the circumstances of the defendants being at the time, and having been for more than twenty years, in possession, but that the estate did not pass under the contract and certificate set forth. His lordship had begun by stating, that the defendant had taken two objections: one that the lands did not pass *under the contract of sale made by the commissioners*; the other, that under the circumstances stated in the special case, the right of maintaining an ejectment is barred by the Statute of Limitations, 21 Jac. I., ch. 15, sec. 1. There is some inaccuracy here in the report, for the statute referred to is

not the ch. 15 of 21 Jac. I., but ch. 14, and it is not the Statute of Limitations, which is ch. 16 of the same year, an act altogether different, the statute intended to be referred to, viz. 21 Jac. I., ch. 14, not being a statute of limitations at all. Now, it is quite evident, that if his lordship had been clear on the latter of the two points, it would not have been necessary to have considered the former; because, if in consequence of anything in the 21 Jac. I., ch. 14, the plaintiff could not bring ejectment, that, of course, made an end of that action. But his lordship's judgment does in fact proceed expressly upon the first point, in which he held, "that the land did not pass from the crown to the purchaser under the contract and certificate," and that being so, it is manifest that it did not become necessary for the court, after they had made up their minds on that point, to come to a clear and precise conclusion upon the effect of the statute, in disabling the purchaser from maintaining an ejectment; for if nothing had passed to him under the certificate, there could be nothing for him to recover in the ejectment. In order to arrive at a conclusion upon the first point, his lordship states the considerations which it involves and with great clearness. They are these: 1st, What was the exact interest or right of the crown in such inclosures at the time of the commissioners granting their certificate? 2nd, What interest, or rights of the crown, the commissioners are authorized by the statute 57 Geo. III., ch. 97, to sell to purchasers? 3rd, Whether the certificate is so framed as to pass the interest or rights of the crown in the same, supposing the commissioners to have power to make sale thereof? After examining each of those points, his lordship came to the conclusion, or rather the court, for it is the judgment of the court delivered by the chief justice, "That the commissioners of woods and forests were not empowered by the statute 57 Geo. III., ch. 97, to sell any property of the crown, so circumstanced as these premises in question were, and that there was nothing in the certificate of sale to shew that they intended so to do, even if they had the power." It is evident that the opinion of the court upon the last point, would of itself dispose of the case before them, and upon grounds confined to that case, for it was not important to consider what the commissioners would have sold, if the instrument given by them was so framed as not to embrace the premises in question. So far indeed as any thing turned upon the powers given by the statute 57 Geo. III., and upon the language of the commissioners' certificate, which the chief justice stated and reasoned upon at length, the case went upon grounds which have no application here. It is expressly stated in the judgment that if the commissioners had the power to transfer lands so situated as those were, they had not in point of fact exercised their power on that occasion, not having used such words of description as would extend to lands of which the crown was not actually in possession, though possessed in contemplation of law, with a view to the legal remedies of the crown. And the chief justice seemed so strong in his opinion, that the descriptive words used in the certificate were inadequate to convey the premises, as to remark, "even if these parcels of waste land had not been out of the actual possession of the crown for twenty years, so as to fall within the statute 21 Jac. I., ch. 14, yet if they had been separated and divided from the remainder of the *wastes of the manor*, and held adversely by the crown for so long a period of time as to be generally known by name or otherwise,

as parcels of land distinct from the *wastes of the manor*, we should have been strongly of opinion, that such enclosures would not have passed under the word manor, the only word in the certificate which is descriptive of land of any kind." Nothing more can be necessary for shewing, that this is a judgment not safely to be taken as deciding any new question of the general operation of the statute 21 Jac. I., ch. 14, either upon the crown or its immediate grantees. But to put that matter even still more clearly, the chief justice is careful to say expressly,—"That in construing the statute 57 Geo. III., ch. 97, the court thought no reliance ought to be placed upon the acknowledged doctrine, that the king may by his prerogative assign a right of action or a chose in action, because this is no conveyance or assignment by the king at all; it is a sale by commissioners, who are putting in force the powers for the first time given to them by that statute." It is true, however, that in connection with the language of that statute, and of the certificate given under it, his lordship is led incidentally, and almost unavoidably, to consider the effect of the statute 21 Jac. I., ch. 14, upon the rights of the crown; and I am induced, notwithstanding what I have stated, to make some remarks upon that part of the judgment, on account of the use that may be attempted to be made of the authority in a very numerous class of cases in this country. In 2 Scott's Reports, 276, S. C., a fuller account is given of the argument of counsel in Doe dem. Watts *v.* Morris, but the judgment of the court is given in both in the same terms. The learned counsel for the defendant is reported to have contended, that in the case they were arguing, a subject would be precluded from bringing ejectment (as he undoubtedly would), and to have added, that when the subject has no ejectment, it may be contended that the king is put to his office found. If this is correctly reported, then either the learned counsel cannot have brought his mind down to a very close examination of the question, or (which it is perhaps always most fair to say of the reasoning of counsel) he probably put forward the argument *quantum valeat*, and without much confidence in its force: certainly, I do not know where he could look for authority to support such a position; and the court do not in their judgment express any concurrence in it. Wherever an individual has been dispossessed, he must bring his ejectment within twenty years, but that is under a statute of limitations which never did apply to the crown. By the Statute of Limitations passed in the same year, 21 Jac. I., ch. 2, and afterwards by the 9 Geo. III., ch. 16, the period of sixty years had been assigned, within which the crown must pursue its remedy or lose its right; but as to all periods short of sixty years, whether it be five years or twenty-five, the legal principle and legal remedies as regards the crown are the same. The learned counsel referred to Reynel's case (*a*), as affording support to his position, but it does not in the least. In that case it is stated as a point resolved, that wherever a common person is put to his action thereupon an office found, the king is put to his *sci. fa.*, as in case of waste, &c.; which is a wholly different thing from saying, that "where the subject has no ejectment, the king is put to his office found." The authorities referred to in Reynel's case 96, and especially Dowtie's case (*b*), shew clearly, that the principle meant to be laid down

is this, that where an estate has been the property of a subject, and comes to the king derivatively, either by the attainder of the owner, or from defect of heirs, then if the tenant of a particular estate in the land has forfeited his contract by breach of any condition, or by committing waste, &c., or if a disseisor were in possession at the time of office found, then in all these cases, as the late owner of the fee would have been put to an action in order to gain possession, so the crown, deriving title through him, shall be in no better case; and notwithstanding the king is seized by office found, he must still bring his sci. fa.; but where, on the other hand, a common person could have entered without action, there the king, deriving title through him, may enter upon his office found without his sci. fa. This is the whole effect of the authority, which is certainly misapplied by the counsel in the argument of *Doe Watts v. Morris*, for there is clearly no connection between the doctrine established by these authorities, and that advanced by the learned counsel, that whenever a common person has lost his remedy by ejectment, there the king is put to his office found. It was necessary, indeed, that the learned counsel's argument should go that length, if he expected to make any thing of the statute 21 Jac. I., ch. 14, but he produced no authority for his principle, and I can find none. If, in the opinion of the court, he had made out that point, there would have been no occasion to examine the statute 57 Geo. III., ch. 97, or the terms of the certificate given under it, nor would the report of the court have been vested upon those points. Yet I confess, I do not find it easy to understand precisely from the language of Sir N. Tindal's judgment, what effect his lordship meant to ascribe to the statute 21 Jac. I., ch. 14, nor the ground upon which some of the conclusions were arrived at which are expressed in his judgment. His lordship fully admitted it to be established, upon authorities which he says are quite decided, that the king can never be put out of possession by the wrongful act of a subject; and he does not deny, that it must follow as a consequence, that the king does not, in contemplation of law, lose his legal seisin of the estate by the intrusion of a stranger, but may bring his information of intrusion, as a subject would in the like case bring trespass, and may charge the intruders in amount, as his bailiffs, for the profits of the premises of which they have wrongfully taken possession. Still his lordship seems inclined to hold, that after twenty years' actual possession by an intruder, the effect of the statute is to leave the crown in that position with respect to the estate, that it has nothing to grant except a right of action; and though his lordship does not adjudge the point, he seems inclined to think, that the right of the king to grant the land by letters patent before he had gained possession might be questioned. This stands so directly opposed to everything that is found in the books on this point, that I cannot imagine it possible that it can ever be found to be the effect of the statute. It cannot be denied, his lordship says, that though the king cannot, in contemplation of law, be put out of possession by the wrongful act of an intruder, yet that in fact he may be so dispossessed; or else what can be the meaning of the statute of 9 Geo. III., ch. 16, which provides that the crown shall lose the estate by sixty years' possession held adversely by a stranger? No doubt there may be in fact an actual visible possession of the land by a trespasser to the exclusion of the crown, but surely that does

not displace the legal seisin of the crown ; it is admitted in the case that it does not. What then follows ? only this, that the crown cannot remove the wrongful intruder by force, and without the intervention of a legal proceeding, which will give such intruder an opportunity of pleading and proving his right to occupation, if he has any ; in other words, as his lordship truly says, the crown cannot recover its actual possession "except by a prerogative process in a court of law." But does it then follow, that wherever the king has occasion to file an information of intrusion he has lost his seisin, or at least his right to make a grant of the estate as an estate in his possession ? That would be at once placing the crown in the same situation as a subject is placed when disseised, and bringing the king within the Statutes of Maintenance, though neither these statutes in their legal effect, nor the considerations of public policy which led to them, have any application in the case of the crown. If a disability of that kind were to follow the necessity of bringing an information of intrusion, then of course it would follow as well when the intruder had been but a month on the land, as when he had been there twenty years ; and his lordship really does seem to be under some such impression, for he remarks that "under an information of intrusion, the crown would not only be entitled to a judgment that the defendant shall be removed from the possession, but in some instances to a judgment for damages also, as where the wrong-doer has cut the king's trees, a consequence (his lordship says) still further removed from the sale of a manor to a subject." This reasoning would apply to a case of recent intrusion, as well as when twenty years had elapsed, but I confess I am unable to see the force of it : I mean if considered apart from the intention and language of the particular statute, 57 Geo. III., ch. 97. It cannot be meant to say, that wherever the crown has occasion to bring an information of intrusion, which it must do in all cases in order to dispossess a trespasser, the king is not in a condition to make a grant of the land, because that would be transferring not only a right to bring an action for possession, but a right to recover damages for the trespass. I should conceive, that in all cases of that kind, as in cases between subject and subject, the grantee could only sue for damages for a trespass committed since he acquired the estate, the prior trespass being no injury to him. So far as the circumstance of the crown having a right at the time to file an information of intrusion to remove a trespasser and to make him pay damages for his trespass, may be any reason why the commissioners of woods and forests cannot or ought not, under the statute 57 Geo. III., to make sale of the manor or estate until the crown has, upon an information of intrusion, removed the trespasser, the question is one that does not concern us ; but if that circumstance had been held by the court, upon general principles of law, to disable the crown from making a grant of the land in the mean time, then, indeed, there would have been something most alarming in the decision, for it would have amounted to a determination that all grants of land made in this province, when at the time of the grant a trespasser was in possession, were void and of no effect to pass the estate. How many hundreds or thousands of grants such a decision might be found to affect, we could not venture to say, but most certainly I should feel it impossible to conform to such an authority ; for I cannot agree, that the proprietors of lands in this province hold their estates subject to the chance of every

decision of every one of the courts of England being at all times consistent with each other upon every point which can affect their title. I do not know what position in our law is clearer than the converse of the position I am examining, and if it had been in the power of the defendant, in the case now standing for our opinion, to produce a modern decision of one of the courts of England, overruling principles which had hitherto been constantly received and acted upon, we should have no right to adopt this new doctrine, and to unsettle an unknown number of titles, by abandoning principles that had been uniformly upheld during fifty years' administration of the law in our courts, backed as they undoubtedly are, by the whole current of English authorities. It would be our duty to abide by the former judgments of this court, rather than by such singular decisions, or we might possibly soon find ourselves under a necessity of changing our ground a second time, in order to conform to some case of some other court in England, bringing back the doctrine to its former grounds. But though in the judgment in *Doe dem. Watts v. Morris*, there seems to be a doubt intimated by the expressions I have cited, whether the mere necessity of bringing an information of intrusion does not disable the crown from granting, yet it is evident that his lordship was rather influenced by an impression that in the case then before the court, it was the twenty-three years' possession coupled with the provisions of the statute 21 Jac. I., ch. 14, which probably had reduced the crown to the necessity of resorting to a prerogative process of another kind than a mere information of intrusion, and that under such circumstances the commissioners could not sell the manor under the statute; whether he meant to hold that neither could the crown have made a grant by letters patent of the same land, is always as it seems to me left doubtful throughout the whole of the judgment. The defendant in the case before us, so interprets his lordship's judgment, or it could give him no assistance. I am persuaded it is impossible the court could have meant that the crown could not grant land, merely because there was a trespasser upon it, to dispossess whom (if he were obstinate), and the crown had retained the estate, it would be necessary to have filed an information of intrusion; now if this be granted, as it surely must be, what can be the difference, whether the crown in such a case desires to make a grant to a third party of land, which has been intruded upon for five years, or for twenty, or for any period short of sixty, when the crown by statute loses its remedy altogether; twenty years' possession is only an important epoch, as between one subject and another, because the statutes of limitation have made it so, which statutes, it is undeniably, do not bind the crown. As regards the title of the crown, I consider that twenty years is of no other significance than two years, nor as regards the legal remedy for removing the trespasser, except for the proper operation, whatever it may be, of the 21 Jac. I., ch. 14. In *Doe Watts v. Morris*, the court seems to have been under the impression, though not decidedly, that in cases within the statute 21 Jac. I., ch. 14, that is after a stranger had been twenty years wrongfully in possession, something more was called for than an information of intrusion, and that hence arose a distinction by force of that statute as to the ability of the crown to grant. It is plain that was what the counsel in *Doe Watts v. Morris* contended for, and what the defendant's counsel in the case now before us endeavours to establish as being

conceded by this judgment in the Common Pleas. If the judgment had gone that length, it would, so far as I have been able to discover, have been unsupported by any previous authority. It does not go that length certainly, but I cannot say that his lordship does not intimate some unsettled conclusion of the kind. In page 199 his lordship, (speaking to be sure with reference to the statute 57 Geo. III.,) questions the right of the commissioners under it, to sell to the subject a right of recovering the possession of wastes, or any property whereof the crown was not in possession in fact, though in contemplation of law it might be deemed to be so for some purposes, whether such recovery was to be effected by bringing a writ of intrusion, or by the finding of an office, or by any other prerogative process whatsoever. Again in page 200, his lordship says, admitting the term "manor to comprise all demesne lands and wastes of the manor, we think it cannot be contended upon any principle of legal construction to include land in the possession of strangers, who could not be turned out of possession thereof, except by information, or inquest of office." In the conclusion of his judgment however, his lordship says, "we hold it unnecessary to enter upon the discussion of the effect and operation of the statute of limitations upon the present action of ejectment, as we grounded our judgment upon the points of law before particularly mentioned, that the intruders after twenty years' adverse possession, were protected even against the crown itself, until a judgment in intrusion; that the commissioners were not empowered by the statute to sell any of the property so circumstanced; and that there is nothing in this certificate of sale, to shew that they intended so to do, even if they had the power;" now from this it would appear, that his lordship did not look to an inquest of office as being necessary for vesting a legal seisin in the crown, or to any thing more than the information of intrusion being carried to judgment, so that it is difficult to say what may have been contemplated as the effect wrought by the 21 Jac. I., ch. 14, in cases where it applied. I do not clearly see either, what his lordship means by the allusion to the possible "effect and operation of the statute of limitations upon the present action of ejectment," a consideration which he declines acting upon. The statute of limitations, binding upon the subject in consequence of twenty years' possession, could clearly not apply in such a case, where the title had been until very recently vested in the crown, and the only limitation binding upon the crown, is that under the 9 Geo. III., ch. 16, which must wait for its operation till sixty years have elapsed. If by what is said in the whole judgment taken together, his lordship can be taken to mean that the mere fact of the crown having to bring an information of intrusion, and obtain judgment upon it, before it could remove the trespassers, would disable the crown from making a grant of the land before such judgment of intrusion had been obtained, then that disability would have place after an intruder had held possession for a week, as well as after any longer time, and such a doctrine I believe would rest for its support upon this single case in opposition to all other existing authorities. If on the other hand his lordship meant, that the fact of having to file an information of intrusion after twenty years' possession, would produce the disability, then he must mean as I have no doubt he did, that the fact of twenty years' possession draws after it this consequence, entirely because of the enactments of the statute 21 Jac. I., ch. 14, for on

no other ground is there authority for saying that the lapse of twenty years merely can have made a difference in the remedy which the crown must pursue, or can have affected in consequence the right of the crown over the estate or its power of transmitting it. Then we come to the statute, which is a short and plain one, and I confess I am wholly unable to see how it can be imagined to have had any such effect. It can hardly be doubted that if in times past it had been so taken, we must have had abundant evidence of such a construction being placed upon it; it could not be at this day a new point, for instances are numerous in England in which the manors and possessions of the crown are encroached upon by inclosures made by the owners of adjacent lands, or by others. The English statute 10 Geo. IV., ch. 50, sec. 96, cited in the judgment, shews this, and this very case of *Doe Watts v. Morris*, shews also that such encroachments may probably escape attention even for twenty years; I have no doubt they have frequently passed unobserved or unattended to for that length of time, and if in every such instance the crown by the operation of the 21 Jac. I., ch. 14, had lost its power of making a grant till it had regained possession, contrary to the maxims and principles of the common law, it cannot be but that the protection of this statute would have been sometimes advanced in cases reported in the books. And yet it is singular that in the two centuries which have elapsed, we find no traces of such a use being attempted to be made of it, nor any notice in text books of its having made this change in the law. In this province the cases we know have not been a few, in which those claiming adversely to the crown, or its grantee, would have found this statute a convenient protection, and yet it has never been resorted to in the hope of ascribing such an effect to it. Nor do I find that in the former British colonies on this continent, when from circumstances such as prevail here, this branch of the law must have frequently been under review, twenty years' possession of crown land, by what is vulgarly called a squatter, was ever held to disable the crown from making a patent of the land to any third party, as freely as if no trespasser had been in possession: I mean without waiting for the result of any prerogative proceeding. The total absence (for I believe I may almost so call it) of cases upon the 21 Jac. I., ch. 14, in the several digests and reports of cases from the time of its passing, seem to me to be irreconcilable with any other conclusion, than that the statute has been always held to have only the effect which it professes to have, of saving the defendant in such cases from the necessity of pleading his title at once, in answer to the information, a provision so simple and intelligible that it could scarcely give rise to any question. Before that statute it had always been the case that a defendant on an information of intrusion, if he meant to vindicate his possession on the ground of title, was obliged to begin by setting out his title in his plea, otherwise the crown title to the land appearing on record, if the defendant merely pleaded not guilty to the information, he was held only to deny the fact of trespass, just as would be the case now under the new rules of pleading in an action of trespass between party and party, and the consequence was that the title of the crown unopposed by any claim of title set up by the defendant, the defendant would be immediately evicted without waiting for any judgment upon the information of intrusion, which could only thereafter be required for the purpose of giving damages for the trespass; on the same

principle as the plaintiff in a suit takes judgment for such part of his demand as is left unanswered by the plea. To place a defendant who has been allowed to remain in possession for twenty years unmolested, on a more equitable footing in this respect, was the whole and single object of the statute, which in substance merely provides that in such cases the defendant may plead the general issue, and shall not be pressed to plead specially, that he may retain the possession as he had it "at the time of the information being filed until the title be tried, found or adjudged for the king." I can see nothing more in this, than that the defendant may remain unmolested until the result of the trial of the information of intrusion, shall shew whether he is an intruder, whether his possession is rightful, which fact may be determined by the court and jury upon the trial of the general issue, denying the trespass instead of being assumed against him, as it used to be wherever he did not set forth specially a title in himself. The defendant in Doe Watts *v.* Morris, evidently wished to maintain the possession; the judgment of the court seems to give some indirect and uncertain countenance to the position that the crown stood in these cases in the right of a party disseised, and required an inquest of office for re-vesting the legal seisin, before the king could make a grant of the estate; whereas it seems quite clear, and is stated in a note to Dyer, 238, that the whole effect of the statute is "*that the subject is allowed to plead the general issue and maintain possession till trial, that is, the trial of the information of intrusion.*" There is nothing here to abrogate or change this well established law, "that an intrusion on the king's possession, does not divest the title from the crown, and that the king not being disseised, his conveyance of the freehold is good, and the grantees are seised by virtue of it (*a*). I was satisfied upon the argument of this case, when the judgment in Doe Watts *v.* Morris was relied upon, that it could not have been left to be discovered at this late day after two centuries had passed, that the statute 21 Jac. I., ch. 14, had so wholly subverted a principle of law, upon which very many titles derived from the crown in this province may depend; and I have been confirmed in this opinion by finding that in a case respecting this same manor of Iscoed, when the attorney general filed an information against the occupant, which was tried in the Court of Exchequer—Attorney General *v.* Parsons (*b*)—the court clearly regarded this statute in the same light. The defendant's counsel there contended, that by twenty years' possession, and the operation of that statute, it had become necessary that the estate should be again vested in the crown by an inquest of office, and the crown could not recover on the information of intrusion; but the court held at once and decidedly, that the statute had only the effect of relieving the defendant from the necessity of setting forth his title, and throwing the onus of shewing title upon the crown after so long a possession. A plaintiff in ejectment must shew his title, before he can recover; so now in cases under this statute, must the crown. But that the crown must shew its title in order to remove the trespasser, and that it is disabled from granting the land, because there is a trespasser upon it, are wholly different positions. To hold that the one must follow from the other, would be to hold that the king and his subjects stand on the same footing

(*a*) Hob. 322; Rolle. Ab. 659.

(*b*) 2 Cr. & M. 23.

in regard to the doctrine of disseisin and the statutes of maintenance, which certainly would be new law. I am, for these reasons, of opinion that the judgment in *Doe dem. Watts v. Morris*, which was confidently relied on by the defendant in the case before us, is no authority for holding more than was decided in that case; namely, that the commissioners of woods and forests could not, under the statute 57 Geo. III., ch. 97, transfer land of which the crown had been out of visible possession for twenty years: or that, if they could, they had at any rate not made such an instrument as did in fact pass such lands. It did not decide that the crown in that case could not have granted the land by letters patent, and has therefore no decisive bearing on this case; and if it had gone to that extent, it is further my opinion, that we could not have properly allowed the single authority of such a case, to prevail against all former judgments rendered in this court, and rendered, as I consider, in accordance with the current of English authority. I know no points in which it is more important in this country, that the law should be consistently administered, and its principles fixed and known, than in those, which regard the rights derived under grants of land from the crown. In Upper Canada, it is but a small portion of the people that are not proprietors of lands; and we know that every estate here is held not merely in imagination mediately or immediately from the sovereign, but that in fact all the lands in the country owned by individuals are derived by grant from the crown, and held under letters patent actually issued at some time within the last fifty years. We cannot tell how much confusion might be produced, and what cases of hardship might arise, if we were to adopt now a new rule of construction unsettling the foundation on which these titles rest. On this account I have been anxious to satisfy myself fully upon the bearing of the case of *Doe dem. Watts v. Morris*, and adhering to what I know to have been the course heretofore taken by this court under similar circumstances, I am of opinion that upon this as well as the other points which have been discussed in this case, the plaintiffs are entitled to our judgment. The statute 21 Jac. I., ch. 14, could not in my opinion have the effect of rendering the patent which has been issued to the lessors of the plaintiff in this cause invalid, even if the grant had been made ex mero motu by the crown. And it is still clear, I think, that it can have no such operation as to disable the crown from carrying into effect the express provisions of an act of parliament, in making a grant in confirmation of the report of the Heir and Devisee Commissioners. To make the grounds of my opinion clear, I will recapitulate shortly, that I think the title of the defendant to the possession could not have been properly supported at the trial by recommending the jury to presume a grant. The suggestion of that ground of defence by the learned counsel, in the case of *Doe dem. Watts v. Morris*, was not in any degree seconded by the court; no authority was cited for carrying the doctrine to that extent, and I have already stated my reasons for concluding that it cannot be, and more especially in a case in this country where a location has actually been made by the crown, which gives to the locatee and his heirs certain rights against the crown, and places the matter as in this case under the jurisdiction of the Heir and Devisee Commissioners. It came out upon the trial, and was admitted in the argument, that the defendants, or under those whom they derived possession, entered claiming to be the heirs

of James Fitzgerald the original nominee, and it would be inconsistent with all principles regarding the presumption of grants (if twenty years' possession would otherwise afford ground for such presumption against the crown) that the effect of the Heir and Devisee Acts should be thus intercepted, by presuming a grant which would prevent their operation. We know that the crown could not and would not have made a grant in confirmation of the possession which had been so taken, except upon a report of the Heir and Devisee Commissioners, and we know that the claim to be heirs of James Fitzgerald has been adjudged by the commissioners in favor of the lessees of the plaintiff and of no one else. To have made a grant to any person as heir, before the claim had been heard, and allowed as the statute provides, would have been contrary to the act of parliament, and as it would have been unjust and illegal, it would have been against the honour of the crown, and is therefore not to be presumed. The language of the court in *Doe dem. Fenwick v. Reid*, (a) is much in point upon this branch of the case. Then putting the presumption of a grant out of the question, as I do, the next ground to be considered is the effect of 23 or 24 years' possession, as an absolute bar to the title of the crown, as an extinguishment or divesting of the estate, so that the crown had no longer anything to grant. It is extremely important, for reasons which I have explained, that the opinion of the court upon this point should be distinctly stated, and that the law respecting it should be consistently upheld. My own opinion is, that such an effect can follow only after a possession of sixty years, and that in consequence of the enactments of 9 Geo. 3. ch. 16.; our present statute of limitation 4 Wm. 4. ch. 1. sec. 16., like the former English statute of 21 Jac. 1. ch. 16., has no effect to bar the right of the Crown, and can only be held to apply between subject and subject. For any period less than sixty years, I think the common law maxim, nullum tempus occurrit regi, continues to be in full force; no laches are to be imputed to the King, and consequently no one gains right against the King by mere encroachment upon his estate for twenty or thirty years. The very passing of that statute, no less than the whole tenor of authority before its passing, is in my opinion conclusive, and it is equally clear that the statute has made no change in the law, which can do prejudice to the right of the crown until after sixty years' adverse possession has been held. That a mere possession of twenty or thirty years without the leave of the crown, does not bar the right of the crown, I consider to be clear; and holding the estate without prejudice from such intrusion, the crown, in my opinion, can upon the principle of the common law grant such estate as freely as it holds it. Then there remains the question which the late case of *Doe dem. Watts v. Morris* has suggested, whether the statute 21 Jac. 1. ch. 14, has not the effect after twenty years' possession, of reducing the crown to the necessity of having its title again placed on record by office found, in order as I suppose to regain the legal seisin, and to give it again such an estate in possession as will pass by a grant of the land in the ordinary form. Upon this point I consider that in the case referred to, an attempt was made to introduce a new principle into the law which governs the prerogative of the crown, and to ascribe to a statute which had been more

than two hundred years in force, an effect which it could not be shewn had ever been attributed to it before. If the attempt had succeeded, still we ought not, in my opinion, to have allowed the authority of that single case to bear down principles which had been upheld by our predecessors, and ourselves, without so far as I know a single exception. But the judgment of the Common Pleas in that case did not affirm the doctrine contended for, but proceeded expressly upon the intention and language of a certain other statute, and the force of an instrument made under it, which are both beside this case, and if it could have been nevertheless gathered from that judgment that the Court of Common Pleas did look upon the twenty-three years' possession, in connection with the statute 21 Jac. I. ch. 14, as reducing the crown to the necessity of resorting to an inquest of office before it could maintain an information as against an intruder, yet we find that in the next year, when an information of intrusion was brought in the Court of Exchequer (*a*), to remove the trespasser from the same premises, and when the defendant's counsel did rest his case expressly upon the twenty-three years' possession, and upon the statute 21 Jac. I. ch. 14, (for in that proceeding by the crown, the statute 57 Geo. III. ch. 97, and the commissioner's certificate under it, were wholly out of the question,) contending that a previous proceeding by inquest of office was necessary, before the crown could be regarded as in possession of the estate, and in a situation to call the defendant to account as an intruder, the Court of Exchequer promptly determined that the statute of Jac. I. had no such effect, that it merely relieved the defendant from the necessity of setting out his title in his plea, upon the peril of being evicted before trial, but that in other respects it left the title and the remedies of the crown on the same ground as they stood before. This, it is worthy of remark, is the decision of that court, whose particular province it is to deal with questions which concern the rights of the crown, and we do not find that the decision was appealed from. Now if it has ever been determined by a court, or has ever been held by a writer of good authority, that the king cannot grant land of which he has so fully the legal seizin, that he can as of course treat as intruders any persons who may without his leave be in possession of it, some such decision or authority should be shewn to us, but none has been, and the authorities to the contrary are to be met with wherever the subject is treated of. And in addition to all this, I think that a case like that before us, where the lessors of the plaintiff claim under a patent issued by the crown upon a report in favor of the heir and in confirmation of the promise of a fee simple made to the original nominee, is attended with particular considerations, which strongly oppose the pretension of any third party having acquired in the mean time a right as against the crown by mere occupation without the king's leave. The intention and provisions of the heir and devisee statutes are not in my opinion to be thus counteracted. It would be inconsistent with all principle, and it would be hard and unjust that they should be; for from the moment that the crown has made a location of the land in such a case, the locatee having a sort of equitable freehold enters and holds possession, or assigns to others at his pleasure, and he is charged with taxes as proprietor of the estate. The legislature has passed laws for

(*a*) Attorney General *v.* Parsons, 2. M. & W. 23.

protecting the rights of his heirs, and for giving effect to his assignments, antecedent to the completion of any patent, which he or they are left to apply for at their convenience. The crown under these circumstances takes no notice who is in possession, and cannot be expected to do so; that some one should be in possession, is the natural consequence of the location, and the presumption would not be that the possessor was a trespasser, whom it was incumbent on the crown to remove. The very imagination of laches on the part of the crown therefore in such a case, would be contrary to reason, as well as contrary to the general principles of law. When the original nominee dies, his heir may be an infant or beyond seas, as was the case of these co-heiresses, or he may be ignorant when his ancestor died, or that he was possessed of any estate, and when he gains information of his right and comes to claim it in proper form, before the proper tribunal, how can it be held that the wrongful possession of another person in the interim, shall stand between him and his right, when he had not the means of dispossessing the intruder, before he had himself acquired the legal estate, and because that estate was still in the crown. That would in effect be to make him lose his estate from the supposed laches of the crown, when the crown had no motive to vigilance, and could not have interfered without acting in apparent contradiction to its own previous act, conferring the beneficial interest on another. If by reason of mere possession or on other grounds, there resided in any person a right adverse to the claimant, under which he could obstruct the issuing of a patent to the heir of the original nominee under the heir and devisee commissioners, the time for advancing such claim, was, while the case was depending before that commission; the statutes provide for notice to adverse claimants, and give full authority to the commissioners to adjudicate finally upon all that is brought before them. Their order and the patent issued upon it, in my opinion, clear the ground of title up to that time, in those cases at least in which it cannot be contended, that the right of the crown has been absolutely barred by the statute 9 Geo. III. ch. 16, after sixty years' possession. Upon the effect of such possession in a case like this we are not now called upon to pronounce.

MACAULAY, J., JONES, J., and HAGEMAN, J., concurred.

Postea to lessors of plaintiff.

LARNED v. McRAE.

Where defendant had agreed to return a steamer, chartered by him, on a certain day, in good repair, dangers by the lake excepted," it was determined that a plea "that before the day arrived the plaintiff took the boat from defendant without his consent, and kept her," was a sufficient bar to the action, though the plea did not in express terms confess and avoid the fact of not returning the boat. Determined also, that damage to a steamer by an accidental fire, not occasioned by lightning, did not excuse the charterer for not returning the steamer in good repair, as it did not come under the exception of dangers of the lakes. *Quære*—Whether a fire occurring in a steamer, from some cause clearly connected with the use of steam, and while the boat was navigating, would come within such exception.

Debt on articles of agreement, which are set out on oyer, and are to the following effect: "On 22nd March, 1842, plaintiff agreed with defendant, in consideration of 125*l.*, to hire to him the steamer 'Western,'

then lying at Chatham, with her rigging and appurtenance in a good and comfortable state, during the then present season of navigation. And the defendant, on his part, engaged to return the steamer in like good order, '*wear and tear' and dangers of the lake excepted.'* And for the due performance of this agreement, each bound himself to the other in the sum of 250*l.* The plaintiff declares on this agreement in five counts, charging as a breach, that although the season of navigation had long since elapsed, the defendant had not returned the steamer, and claiming on that account the stipulated penalty. In the 3rd and 4th counts, he avers that the steamer was by the defendant's misconduct wholly destroyed and lost, and not from wear and tear, or dangers of the lakes, as excepted in the agreement. The defendant pleads to these counts: 1st. "That on the 29th of April, 1842, long before the close of the navigation for that season, plaintiff, without the consent and against the will of the defendant, took the steamer with the appurtenances into his own possession, and to his own use, and for his own purposes, and carried her to Chatham, and kept her from that time to the close of the navigation, and from thence hitherto, &c., and he avers that he has in all other things kept his agreement." In a second plea to the first five counts he pleads, "that on the 24th of April, 1842, the steamer with the appurtenances, without the neglect or default of defendant, was in part accidentally destroyed by fire, long before the close of the navigation; and that immediately after such destruction, viz.—on the 29th of April, and before defendant could repair and refinish the steamer, and put her in like good order as before, &c., according to the agreement, and long before defendant had used her for his own profit to the end of the season, and long before he could at the close of the season, after such sole use and profit, return the steamer to the plaintiff in like good order, &c., plaintiff, without the consent and against the will of defendant, took the steamer with the appurtenances into his own possession, to his own use and for his own purposes, at Detroit, &c." In a third plea defendant pleads to the same five counts, "that the steamer with her appurtenances being on the said 24th April at a port in the route of her ordinary navigation at Detroit, to wit at Sandwich, &c., where she was used and accustomed to ply, lay to, touch at and frequent, being in a part of the continuation of the navigation of the lakes, called the strait or river of Detroit, between Lake St. Clair and Lake Erie, according to the intent, &c., of the said agreement, and in the navigation of which as such steamer it was necessary, and the steamer was accustomed to have and carry fires in the furnaces of the steamer for making or generating steam, by which the said steamer was propelled, &c., the said fires in the furnaces of the steamer, and the said steam so generated and made in the boilers of the said steamer, *so being such dangers of the lakes to such steam-boat so propelled by the agency of fire and steam,* according to the tenor and effect and true intent and meaning of the agreement, viz.—on 24th of April aforesaid, at, &c., without the neglect or default of defendant, while lying at the port so situated in the said strait, so being such continuation of the said lakes, which the steamer was accustomed to frequent for the ordinary purposes of the navigation of the said lakes, in coming to, going from, and laying up at in the day, and in the night, as was usual and necessary for such steamers in using such navigation, in the night time of the day last aforesaid, after the fire in the

furnaces of the said steamer was apparently, and as defendant believed, extinguished for the night, in the usual manner, the steamer with her appurtenances was by accident, and by means of fire and heat from the said furnaces, and without the neglect or default of the said defendant, unavoidably burnt and damaged, and in part destroyed, at, &c." To these pleas plaintiff demurs specially.

Hagarty for plaintiff.

Foster for defendant.

ROBINSON, C. J.—Each of the pleas is pleaded as a defence to the first, second, third, fourth, and fifth counts; and if either of them is in substance an insufficient answer to any of the counts, or is bad as an answer to any one of such counts, on account of some defect in form specially assigned as cause of demurrer, then of course such plea must be held to be bad, upon the principle that a plea must sufficiently answer all that it professes to answer; and if it be bad in part, it is bad in the whole. It seemed to be the main object of the demurrer to obtain the opinion of the court upon the substantial question, whether the accident by fire, occurring as it is stated in some of the pleas to have occurred, is an accident coming within the exception of *dangers of the lake*, so that it excuses the defendant, under the agreement, from damages for not returning the steamer at the end of the season. But I suppose it is necessary also, as regards the costs of these pleadings, that we should determine upon the sufficiency of each of the pleas. The first plea seems to be a good answer to the first count. It is no objection that defendant says he kept all other covenants (besides the returning the boat,) "which he ought to have performed," because he stipulates for nothing else than that act; and therefore no question of law can arise as to what he "ought to have performed," supposing that word "ought," might imply anything different from what he engaged to perform. It does not seem to me that it was necessary for the defendant to have concluded with an *et sic*, "and so he could not return the said boat," (a) for he shews that the plaintiff had the boat before the end of the season, and kept her from that time; so there could certainly be no returning her at the end of the season. If the plaintiff had left the province, and could not be found at the end of the season, so that defendant having the boat, and being able otherwise to return her, could not from that cause, there would seem then to be a propriety in adding the "*et sic*." But it is held, that if the special matter of the plea is a sufficient bar, then it is not necessary to conclude with an "*et sic*." This case, I think, comes within that exception; especially as the agreement says expressly, that the penalty claimed in this action is to be paid "by the party failing to *the party abiding or wishing to abide by the agreement*." Surely if the party suing for this penalty, on the pretence that the boat was not returned to him at the end of the season, did himself take her out of the possession of the other party, long before the season ended, in direct violation of the agreement, he can have no right to claim the penalty. What the defendant urges in his plea is not merely an excuse for not performing his agreement, it is a bar to the plaintiff's right to sue for the penalty from him, because he had not the boat at the end of the season, by reason of plaintiff having broken his agreement.

Muntz *v.* Foster (*a*), referred to by plaintiff's counsel, is not in point. The defendant in that case meant by his plea to deny what the plaintiff had averred in his declaration, but did not do it directly, and conclude to the country ; he set up a fact inconsistent with it, and concluded with a verification. That was held to be bad, as being an argumentative denial. Here the breach assigned is, that defendant did not return the steamer ; and the defendant not meaning to deny the non-return of the boat, could not plead that he did return her, and so conclude to the country ; but admitting, and meaning to admit, that he did not at the end of the season return the boat, he pleads the fact which prevented his literal compliance with his undertaking ; and as that fact was one which in law excused him on account of the impossibility which the plaintiff's own misconduct had created, he relied upon it as his defence ; he could not in such a case do otherwise than conclude with a verification ; nor is this any argumentative denial of the plaintiff's declaration, on the contrary, it is an admission that he did not in fact deliver the boat ; but stating, what of course the plaintiff had not stated, that it was because he could not. This was new matter necessary to be set forth as accounting for an apparent non-performance, when there had in fact been no failure. He could do no otherwise than plead it as new affirmative matter, concluding with a verification. He could not conclude absque hoc, that he "did not return the boat," which was the breach charged ; that would have been absurd, because it was in fact true that he did not return the boat. The only question is, whether it was necessary for him in point of form to conclude with an *et sic*. "And so the said defendant saith, that the said boat having been taken and detained by the said plaintiff, as in this plea alleged, the said defendant could not return the same at the end of the season, &c., according to the said agreement." Upon that point I have already stated, that it appears to me such an allegation was in this case unnecessary. When bail, being sued on their recognizance, plead that the debtor died before *ca. sa.* issued, the form of pleading is like this, simply setting forth the fact of his death—not saying "and so" they could not render him, and not expressly confessing a breach. So, if tenant sued in debt for rent, pleads eviction, he does not plead wherefore he did not pay the rent, or expressly say that he did not. If a tenant who has agreed to surrender up premises in repair at the end of the term, or pay a penalty of 500*l.*, is sued for that penalty, he might, I think, plead that before the term ended plaintiff entered and evicted him, and there stop. The case of Duke of St. Albans *v.* Shore (*b*), appears to me to be precisely in point, and supports these pleas fully. If this plea be a sufficient answer to the first count, then it must equally be a good answer to the second and fifth counts ; and I think it is in substance and in form a sufficient answer to those three counts. Then the only new question that can be raised in respect to the third and fourth counts is, that those counts, besides charging the breach of agreement in not returning the boat, aver that the defendant so misconducted himself that the steamer while chartered to him was wholly destroyed, and lost to plaintiff. It may be said, this is charging something affirmatively as a breach of the condition, which the defendant cannot answer as he does in this plea, by setting up another

affirmative, viz.—“that plaintiff took the boat from him,” because two affirmatives do not make a good issue; but this additional allegation of the destruction of the boat, in the third and fourth counts, can make no difference, for it is immaterial what became of the boat, so long as she was not returned. A good breach had been charged before, in not returning her; and it would be no defect in the plea, if it left this part of those counts wholly unanswered. It is consequently of no moment to inquire whether the plea answers it well, either as regards form or substance. I cannot therefore see any clear ground on which it can be held that the first plea does not sufficiently answer all the counts. The second plea is also good, in my opinion. The difference between it and the first is, that it rests the defence upon the plaintiff having taken the boat from defendant before the end of the season, without averring that plaintiff kept the boat to the end of the season, and still detains her. It puts it to us therefore to say, whether the fact of taking the boat, and keeping her, though but for a day or an hour, would release the defendant from this covenant to return her. In my opinion, it would put an end to the agreement. The plaintiff could no longer sue upon this contract for the return of the boat, because he would not have “*abided by the agreement*,” and so could not, according to the very words of the agreement (besides the general principles of law in such cases), sue for the penalty which he claims in this action. If, after this wrongful taking of the boat from his possession, the defendant did take her back, he would thenceforth have held her not under this agreement, but under a new agreement either express or implied; and the plaintiff, no doubt, would have a remedy by an action of trover, if he unlawfully detained her, but would not be in a condition to sue for the penalty of 250*l.* The third plea is the one intended to bring in question the substantial merits of the case; the point being whether, the boat being “*burnt and damaged, and in part destroyed*,” as alleged in this plea, the defendant was thereby excused from returning her at the end of the season, on the ground that such an accident comes within the exception of the “*dangers of the lake*.” This plea, in my opinion, is clearly bad, not being a sufficient answer to any of the counts. It does not state positively that the boat was burnt before the end of the season, *i. e.* before the time when defendant ought to have returned her, for it only states a day under a videlicet. But the decisive objection to the plea is, that for all that is stated in it, the damage to the boat may have been but trifling, in which case it would form no obstacle to the delivering up of the boat, unless we could hold (which would be absurd), that in case of a trifling injury being done to the boat, such as the defendant would not be liable for, he would on that account have a right to keep the boat after the season closed, and of course for ever. The fact as pleaded can be no excuse for not returning the boat. If the plaintiff’s complaint had been merely that the defendant did not return the boat *in good repair*, and the defendant had pleaded that he did return her in good repair, except as to the damage done by the accidental fire, relying upon that being a casualty for which he was not liable, that would have brought up the question, which I suppose it must have been intended to present. But the effect of this plea is very different, and it is obvious that it cannot be a good answer to the breaches assigned. With respect to the substantial question, whether the total or partial destruction of the steamboat by a fire occurring

under the circumstances set forth, would be an accident coming within the exception of "the dangers of the lake," it is not necessary to determine it upon these pleadings, for it is this third plea only which involves that question, and that is clearly a bad plea, for the reasons already stated. But, for my own part, I have no objection to say, that I think this casualty does not come within the term "*dangers of the lake*." The statute 26 Geo. III., c. 86, s. 2, which exempts owners of vessels from answering for any loss by fire, shews clearly that such a loss did not before come within the exception commonly inserted in bills of lading against "perils of the sea;" and it is clear, that by the common law the owners of vessels were before liable for loss of cargo by fire, when the fire did not arise from lightning. The words "*dangers of the lake*," must have the same import, when applied to our navigation, as the words "perils of the sea," applied to the ocean, and they are held clearly to denote "the natural accidents peculiar to that element." Now, it cannot be said, that an accidental fire, arising from the ignition of wood or other combustible material in proximity to fire, whether it may arise from the wood, &c., being imprudently placed or left there, or from the fire being carelessly guarded, is an accident peculiar to the element of water. It happens as frequently on shore, and more frequently. Where a common carrier by water undertakes to deliver goods, "*the danger of the lake excepted*," I conceive that he would be liable if his vessel took fire otherwise than by lightning, and the goods were burnt, except as the statute before referred to might protect him. And, as between landlord and tenant, if a tenant covenants to repair, and makes no exceptions of accidents by fire, he must rebuild the house if it be accidentally burnt; so when the defendant has covenanted to return the steamer, "*dangers of the lake excepted*," he must return her or pay for her, although she has been burnt while in his charge, unless the fire, occurring as it is described to have occurred here, comes within the exception. There can only remain the question in this case, whether when the fire occurs in consequence of the use of steam, that shall not be regarded as a danger of the lakes, peculiar to the navigation by steamers, and inseparable from it. At present it is my impression, that an accident by fire, not arising from explosion or other casualties attending steam, against which there may be no certain security, but arising from the fire in the furnace not being well secured or guarded, would not come within the exceptions of "*dangers of the lake*." For all that appears in this plea, the fire may have happened precisely as in a house, by a coal flying out from the furnace while there was no careful person present, or from the wood-work not being well protected; an accident which might happen also to any ship from the negligent use of fire used for cooking. It is not necessary now to anticipate a question which may some day arise, upon the liability of the owner of a steamer for accidents by fire occurring while the engine is in motion, and the steamer is actually navigating, and arising from a danger inseparable from the use of steam, and peculiar to that description of vessel. I am of opinion, that a loss by fire, occurring in a steamer lying in harbour by a wharf, and for all that appears, occurring from just the description of carelessness which might occasion a fire in a house, is a loss that must be borne by the charterer, where only "*the dangers of the lake*" are excepted; but whether this opinion be correct or not, this third plea is nevertheless bad, for reasons

which I have already stated. I am of opinion, that defendant is entitled to judgment upon the first and second plea, and the plaintiff upon the third plea.

MACAULAY J.—The pleas seem to me all bad. The first is pleaded in bar, not to the breaches of covenant assigned, or any part thereof; but to so much of the agreements in the first five counts mentioned, as relates to the return of the boat in good order; as if the agreements and steam-boats therein mentioned and said to be other agreements and other boats were one and the same; and to all it is pleaded that after the agreement, and before the close of the navigation, the plaintiff took the boat out of defendant's possession, and retained it till the navigation closed. Now if this plea is bad in part, or to one count, it is bad in *toto*; unless it can be taken distributively as a separate plea to each count. The first breach is, that he did not return her at the close; the answer is by plea in bar that before the close of the season plaintiff took her out of defendant's possession, &c., and has kept her ever since. The second breach is of like effect. The third breach alleges that the boat while leased and chartered to defendant, was lost and destroyed. This is not met or answered by the plea. The fourth is of like import. The fifth of import same as first and second. Now the object of the first, second, and fifth counts may be, to obtain damages for not returning the boat, and after recovering, the plaintiff might demand her of defendant, and if withheld, bring trover for a conversion. Under those counts he could but receive the value of the boat. Under the third count he claims the value of the boat, alleging it to be destroyed, and the alleged destruction through the defendant's negligence is not answered by the plea, except argumentatively. I am not satisfied it is a good plea at all to any of the counts without something more; but I cannot but regard it as at least an insufficient answer to the third count; and being bad in part, it is bad in *toto*. The defendant does not plead a breach of contract, on the defendant's part in bar of his right to maintain the action as having failed in a condition precedent on his part. The matter pleaded would raise an immaterial issue. The second plea is equally bad; and so is the third, which neither avers nor excuses the return of the boat. As to the main question, it appears to me, that accidents by fire while the vessel is lying in port, whether from casualty or the steam furnaces, do not come within the exception of perils of the lake, which are terms equivalent to perils of the seas; and extend only to cases where the uncontrollable action of the elements is the proximate cause of the injury; and the plea discloses no circumstances that shew that here.

JONES J.—I have had great difficulty in making up my judgment in this case, from the apparent conflict between the rules of pleading laid down in all the treatises upon the subject; and the forms to be found throughout the books; but I now think these are reconcileable. The objection to the pleas is that they do not confess and avoid, or traverse the breaches laid in the declaration, except argumentatively. Pleas in confession and avoidance, are either in *justification*, or *excuse*, or in *discharge*. The plea in this case is in *justification* or *excuse*; and therefore does not admit the breach; there was nothing to confess, except the making of the agreement, which is admitted. The defendant could not traverse the breach, and allege the return of the boat, because he did *not*

return it ; and therefore could neither directly or argumentatively traverse it ; but, in the first plea to the first count, he justifies or excuses the non-performance of the agreement, the breach of which is alleged, by shewing that the plaintiff, contrary to his agreement, the performance of which was a condition precedent on his part, took the boat out of his possession before the end of the season, and thereby rendered it impossible for the defendant to return the boat to him, according to his undertaking. This fact shews a legal excuse for not returning the boat ; and is pleaded in the same manner that bail plead to debt upon recognizance the death of the principal before the issuing of a *ca sa* ; or that the tenant in an action of covenant for non-payment of rent pleads eviction. He does not traverse the breach, because he did not perform his agreement ; and he does not confess the breach, because he justifies or excuses the non-performance of his agreement, by pleading that which shews the non-observance of the agreement on the part of the plaintiff, which was a condition precedent, and the impossibility on his part to return the boat, because the plaintiff had himself taken the boat out of his possession, before any breach occurred. The subject of the several breaches as laid in the first and second counts is the not returning the boat ; and the addition in some of them as to her not being in repair, or permitting her to be burnt, is to be regarded in the same light as matter of aggravation charged in an action of trespass, which need not be answered. I am therefore of opinion that the first plea is a good answer to the several counts to which it is pleaded. The second plea is also good. The third bad for the reasons assigned by the Chief Justice. I give no opinion upon the question probably intended to be raised by these pleas as to the liability of the defendant to pay for the boat, notwithstanding her being destroyed by fire.

HAGERMAN J., concurred.

BIGGS v. BURNHAM.

The father of an illegitimate daughter can not under our statute 7 Wm. IV. ch. 8, bring an action for her seduction, merely on the footing of being her father.

Case for seduction of Agnes Biggs, being the *natural daughter and servant of the plaintiff*, stating, as usual, loss of service and expence, &c.

Defendant pleads the general issue.

The learned judge ruled at the trial that the action could not be sustained, because at the time of the injury Agnes Biggs was living in the service of a third party ; and there was nothing to support the action on the footing of the relation of master and servant : and it was the opinion of the learned judge that our statute 7 Wm. IV. ch. 8. dispensed with the necessity of proving service only in the case of parents of legitimate children.

Plaintiff was non-suited ; and he now moves to set aside the non-suit and obtain a new trial, on the ground which he endeavoured to maintain at the trial, that the statute calls for a liberal construction in this respect ; and may be applied to the case of the reputed fathers of illegitimate children.

Kenneth McKenzie, counsel for plaintiff.

J. G. Armour, for defendant.

ROBINSON, C. J.—This case is since the new rules for pleading. The general issue therefore denies only the fact of seduction, and the fact

averred in the declaration that the female seduced was both the natural daughter and the *servant* of plaintiff, must be taken to be admitted; upon which ground I apprehend the plaintiff should have recovered at Nisi Prius; but this seems not to have been pointed out by the plaintiff's counsel at the trial, and escaped attention. It would not however be of any use to the plaintiff to grant him a new trial on that account, unless we felt that we could properly resist the application which would no doubt be made to us on behalf of the defendant to amend the pleadings. Considering how recently this was after the new rules, when their effect was not so likely to be well understood or remembered; that this is an objection which is now shewn and admitted to exist in fact, and goes to the very ground of the action; and that plaintiff being non-suited in a case where in truth (if we should think so) he ought not to recover, has occasion for the interposition of the court to relieve him, and that on a point not pressed or adverted to on the trial, I think we could hardly set aside the non-suit on this ground and yet hold the defendant to his plea. Then as to the principal question; the counsel for the plaintiff argued it with much ability upon reason and principle, and upon such authorities as seemed to be applicable; but this is an action clearly not maintainable otherwise than under our statute 7 Wm. IV. ch. 8; and we must therefore first inquire what that statute requires or permits; for if this reference will decide the question it is of no purpose to look further. The title is "an act to make the remedy in cases of seduction more effectual, and to render the fathers of illegitimate children liable for their support." It is not, we must observe, to give any new remedy in cases of seduction where none existed before; but to make "*the remedy*" (that is the remedy which the law now gives) *more effectual*, that is, more effectual than it has been. The preamble says "Whereas in some cases the law fails in affording redress to parents whose daughters have been seduced"; now the law can not be said to *fail* in doing what it never contemplated, or intended doing. It did, before the passing of that act, (as it was practically administered at least,) profess to offer redress to parents of legitimate children, but not to the parents of illegitimate children. To the latter it did *not fail* "in some cases" to give redress; it refused in *all cases* to allow them to sue for the seduction of their natural daughter—that is to sue *as parents*. Where they were actually receiving service as other masters might do, they could sue as masters, not on any other footing. Then comes the first clause, on which, I think, rather than on the second, this question must turn. The enactment is this: "that the father, or in case of his death, the mother, of any unmarried female who may be seduced after the passing of this act, and for whose seduction such father or mother could sustain an action, in case such unmarried female were at the time dwelling under his protection, shall be entitled to maintain an action for seduction, notwithstanding such unmarried female was, at the time of her seduction, serving or residing with any other person upon hire or otherwise, any former law, &c., to the contrary notwithstanding." It is impossible to apply this to the case of the father of an illegitimate child; because it is not true of him that he could, as the law before stood, have brought an action because of his being the parent, for the seduction of his child, who was merely living under his protection. He did not stand *in loco parentis* as regards this remedy;

nor on any other ground than an uncle or brother would do, or indeed any stranger in blood. The second clause is not important to be observed upon, further than as it shews clearly that the legislature were merely applying themselves to the enlargement of an existing remedy, by removing obstructions which sometimes impeded it. Having, as we must presume, the actual state of the law on this subject under their view, they seem to have reasoned thus:—"By the law as it stands, the remedy for seduction "is founded on a supposed relation of master and servant, and an injury "from the loss of that service consequent upon the seduction;" but as it is in fact administered, the father (of a legitimate child) is allowed to recover damages for what is in truth the substantial injury, in most cases where such actions have been brought, namely, the injury to his feelings; the disgrace brought upon his family; the disappointment of all hope of his daughter being respectably settled in life, which is a damage in a pecuniary sense, as well as a source of unhappiness; but it was held necessary to shew something to support the idea of the relation of master and servant, in order to open the way to receive compensation for these injuries, which had, in fact, but little to do with that relation. In many cases, perhaps in most, from the situation in life of the parties, the idea of service was imaginary; but the court accepted as proof of it any little acts that a daughter living under her father's roof might be supposed to be likely to do, such as making tea, &c. This, as the court has said, was "winking pretty hard," but there would sometimes happen cases where the daughter was not living under her father's protection at the time; but was even serving a stranger, for hire, and receiving her wages for her own use. There the court could not wink so hard as not to see that there was no relation of master and servant existing in such cases; and consequently that ground, though merely a formal one, was plainly absent on which alone the action was in strictness founded on the record. The courts have sometimes been hard pressed to overcome this difficulty, but they have felt themselves unable; for it would, in truth, have been legislating; and in consequence, what was in truth the grievous injury intended to be redressed, has, in such cases, not been redressed. It is plain on the face of our statute, that what the Legislature had in view, and all they had in view, in this branch of the act, was to relieve the action which a parent might bring for seduction, from the inconveniences in the one case of having to resort to imaginary acts of service, where the law could intend service, and to remove the difficulty which denied the action to the father when the service could not be intended. Further than this, I think the statute has not gone. It might be reasonable in the legislature, to go farther than they have done, and to extend the remedy, for the first time, to the father of an illegitimate child, on the same ground as to other parents. And it may seem to suggest an argument for such a change in the law, that, in this same statute, they have made the fathers of illegitimate children liable to be sued for their support. It might be said, while you were throwing upon them the burthen and duties of parents, you should have conferred upon them the privileges of parents. I do not say whether this should or should not have been done; there may be reasons on both sides; but we cannot do it under this statute, nor by any authority that belongs to us as a court. The cases which have been cited are very material, no doubt, where they can apply; but the obvious

answer to them all is, that by the constant course of the law before this statute was passed, it was not held upon those authorities, or any others of that kind, that because the father of an illegitimate child was, in such cases, held to come within the relation of parent, therefore, he might by analogy claim damages, as a father, for the seduction of his daughter; and this being clearly the case before the statute, it must be still the case, except as the statute may have altered the law. It has not, in my opinion, altered the law to the extent claimed; and therefore we ought not to disturb this verdict, unless it can be insisted that we are bound to do so of strict right, as the relation of master and servant is admitted on the record. That point was not insisted upon, or brought to the notice of the learned judge, on the trial: and if, nevertheless, we were to give effect to it, we should feel it just to allow the defendant to amend his pleading; so that it becomes a question merely as to the costs of the last trial; and we should not go out of the ordinary course, in order to save those to the plaintiff, when it is clear to us, that he has brought an action which cannot, in substance, be sustained, either on the common or statute law. The plaintiff was not, in this case, in any sense standing *in loco parentis*, further than that he is the putative father, for he resides on the other side of the Atlantic.

JONES, J.—As the law at present stands in England, and as it was in this province, up to the passing of the act 7 Wm. IV. ch. 8, the father could maintain no action for the seduction of his daughter, unless there was actual service, or liability to service; or unless the daughter was under the control of her father. It is, therefore, quite clear, that the plaintiff, the reputed father of the girl seduced in this case, could maintain no action unless under the provisions of the statute referred to. The statute had in view two objects: first, to make the remedy, in cases of seduction, more effectual; and secondly, to render the fathers of illegitimate children liable for their support,—with the latter object, we have nothing to do in this case. The great mischief intended and relieved against by the statute was, the seduction of unmarried females by their masters; affording to the father, or mother, a remedy against the master, and also against others, where, before the passing of the act, an action could alone be brought in the name of the master. It gives to the father of any unmarried female, who may be seduced, for whose seduction he could have sustained an action, in case such female had been residing under his protection, a right to maintain an action for seduction, notwithstanding such female was, at the time of such seduction, serving or residing with any other person, upon hire or otherwise: and in all such actions brought by the father or mother, proof of service is dispensed with. The statute makes no alteration whatever in the law, in cases of seduction, except in actions brought by the father, or mother: and therefore gives no additional remedy to the reputed father against the seducer of his illegitimate daughter: he stands in the same relation towards his daughter as before the passing of the act; and can only maintain the action for loss of service, regarding his daughter as all others are regarded, in the light of servants; and the proof of service cannot be dispensed with. Here the reputed father lives in Ireland, and his daughter resides in this country; under such circumstances, he can bring no action for her seduction. It was contended, that by the pleadings, the service was admitted, and consequently the plaintiff entitled to

recover. It seems, however, that even since the new rules, the plaintiff must, in England, prove service, when only the general issue is pleaded (but see *Jurist*, 1843, page 1153). But if the action cannot be sustained, it would be useless to set aside this non-suit, were the fact of service admitted by the pleadings, because the defendant would then be entitled to amend his plea, and thereby make it necessary for the plaintiff to give evidence which, it appears clearly, he is incapable of doing (*a*).

MACAULAY, J., and HAGERMAN, J., concurred.

McMAHON v. COFFEE.

Where work has been agreed to be done upon a certain credit, and the party, by failing to perform it within the time set, has disabled himself from suing upon the special contract, he cannot, therefore, recover on the common counts, before the expiration of the credit under the agreement.

Defendant, in October, 1841, agreed with plaintiff, that plaintiff should chop and clear for him ten acres of land, at a certain price, to be finished and fit for crop by 10th September, 1842; and defendant was to pay him in the winter of 1844; the intention being that defendant, in the autumn of 1842, was to put the ten acres in wheat, and be able, from the produce harvested in 1843, to pay plaintiff in the winter of 1844, when he could bring it to market. Plaintiff was not punctual in fulfilling his undertaking, but on 10th September, 1842, when it ought to have been completed, he had none of it fully cleared and fit for crop, and four or five acres were only chopped over, and not cleared off; defendant, in consequence, on the 10th of September, told plaintiff he must give up the work, and went on and completed the clearing himself, and put the land in crop. Plaintiff sued for the work and labour done by him, declaring on the common counts; and the question reserved for the consideration of the court was, whether he could recover before the winter of 1844; that is, whether defendant had lost the advantage of the credit for which he had stipulated.

Bethune, counsel for plaintiff.

Blake, counsel for defendant.

ROBINSON, C. J.—At the trial, I was strongly under the impression that the plaintiff could not demand prompt payment under the circumstances, but to prevent the necessity of another trial, if I should be found wrong, I directed the jury to find the reasonable sum to be paid to plaintiff for his labour; and it was agreed to reserve it for the court to determine whether plaintiff should be allowed to enter judgment for that sum, or whether he should be non-suited. It seems, now, to be a point settled, that this defence may be given under the general issue: i. e., that credit was given by the plaintiff, which had not expired when the action was brought. It was ruled otherwise by the Queen's Bench (*b*); but that ruling has been held to be erroneous (*c*). Upon the question, whether plaintiff is entitled to sue for his payment before the winter of 1844, I am of opinion that nothing that has happened has given him that right; and it seems to me to be a point too plain to admit of a doubt. Plaintiff

(*a*) 7 C. & P. 258; Stark Ed. 2d vol. 991. (*b*) 4 Nev. & Man. 182.

(*c*) 1 M. & W. 333, 5 Dowl. 90; 1. Gale, 47; 1 C. M. & R. 741; 5 Tyr. 373; 3 Dowl. 461; 1 M. & W. 542; 3 M. & W. 502.

supports his claim to sue at once, by saying "the defendant has disabled me from suing on the agreement ; I was willing to complete the work, "but he would not let me. I am driven, therefore, to abandon the agreement, and may, as in other cases, recover at once for my work and "labor." But that is not stating the case truly ; the plaintiff has not been prevented from suing on the agreement by any thing which the defendant has done ; he lost that right by breaking his contract, in not finishing his work on the day set. The defendant has not broken the agreement in any thing ; and this being so, it is repugnant to reason and justice, to say that he has lost the advantage of the credit he stipulated for. Defendant was in no manner bound to wait beyond the 10th of September ; but if he had done so, and had taken no notice of plaintiff's delay, and allowed him to go on, then if plaintiff had finished the job in October or January instead of September, he could no more have sued on the agreement than he can now ; but it never could follow that having lost the advantage of his agreement, he could by that failure of his own entitle himself to be paid at once, for then he would be in a better situation by breaking his agreement, than by keeping it. If plaintiff, after what has happened, can insist on prompt payment, then it must follow, that if in August he had cleared nine acres of the ten, he might have refused to finish his work, and brought his action and obliged the defendant to pay promptly for the nine acres he had cleared. Let us reverse the case, and suppose that the defendant had repented of the price which he had agreed to pay, after the plaintiff had finished nine acres, and when he was going on to complete the tenth within the time, then upon the same principle which the plaintiff now contends for, defendant might have wrongfully turned him away from the job, and then said : "the agreement is rescinded : you "can now only sue for your labour, and recover what a jury may think fit "to give you." No man can, by his own wrongful act, procure an advantage to himself ; a jury would, in such a case, be directed to take the agreement for the measure of the value of the work, although by the defendant's wrong it had not been fully performed ; and on the same principle, they should here take the agreement for the time at which defendant was to pay for the work ; though by plaintiff's wrong the agreement had not been wholly performed. One party cannot, at his pleasure, rescind his agreement so as to place himself in a better situation than if he had kept it. His non-performance entitles the other to abandon the contract ; but it is a legal principle, that the right to rescind a contract vests only in the party who has been guilty of no default. Surely the defendant, in a case like this, may say : "you have by your laches lost the benefit of the "agreement, but I have not." Nothing can turn upon the fact that the defendant refused to let plaintiff go on with the work after the 10th of September, because that was no breach of the agreement ; it was broken before ; plaintiff can therefore only say : "I have lost the benefit of my agreement, by not keeping my time ;" he might as well say, "I have done "my work badly, and contrary to the agreement : therefore I insist on "your paying me at once ; though if I had done it well, I must have "waited for my payment till next year." It is strictly true, here, to say that the work was not done upon an implied agreement to pay for it at once ; a credit was given, which, plaintiff cannot by his own act or omission recal.

MACAULAY, J.—It may be inferred from the evidence that the land to be cleared was in the defendant's possession: it was, therefore, work and labour done by the plaintiff for the defendant, and at his request, upon his own property, under the special agreement: and the time for completing the work was to arrive before the time appointed for payment of the 25*l*, but, concurrently with the execution of the work by the plaintiff, the defendant was to board the plaintiff and his workmen. The clearing and fencing the ten acres of land, to be done by the 10th September, 1842, constituted the whole consideration on the plaintiff's part; the boarding the plaintiff and his men, during the progress of the work, before that day, and the payment of 25*l*. afterwards, in the winter of 1844, constituted the whole consideration on the defendant's part; and the contract was entire, as respected all that was to be done on the plaintiff's part, and as to the payment of the 25*l*., part of what was to be done on the defendant's part. Part of the work was performed before the 10th of September, up to which day, defendant had well and truly observed all that was to be done on his part, by boarding the plaintiff and his men; the defendant had failed to execute, fully, his part, by clearing and fencing the ten acres of land, and the defendant refused to let him proceed, and discharged him from doing any more. It is contended, for defendant, that the plaintiff cannot recover, on the ground that the work was done under a special agreement: by the terms of which, the plaintiff was not to be paid, until a period that had not arrived when the action was brought. On the other hand, the plaintiff relied on his right to recover, not as having fulfilled his contract, but because, having failed therein, and the defendant having precluded him from finishing the work, he never could recover on the special agreement, if full performance by the 10th September formed (as contended for by the defendant) a condition precedent; wherefore, his only remedy (if any) must be by the form of action adopted, for the value of the work done, founded upon the defendant's subsequent adoption of the benefit: in other words, upon an implied contract, resulting from an executed consideration, affording a remedy where none existed before, or would otherwise have accrued. This case seems to me to involve several important points, touching the doctrine of executory contracts; and upon the best consideration I can give, it seems to me the plaintiff's right to recover, or not, will depend upon whether the contract, under the circumstances, can be and has been rescinded by either party; a point that I confess has not appeared to me of easy solution. The work done was, from the nature of it, a benefit conferred upon the defendant; his agreement required him to compensate its performance by boarding the plaintiff and workmen, and he availed himself of the improvements made by the plaintiff upon his lands. It appears to me, that if either party rescinded the agreement before the present action was brought, it is maintainable for the value of the work and labour done and performed by the plaintiff for the defendant, at his request; otherwise not. And, under like circumstances, the defendant would be entitled to set off the board and lodging of the plaintiff's workmen, or to bring an action of indebitatus assumpsit for the same. Whether either party could rescind the contract, is another question. The defendant could do so only in the event of full performance on the plaintiff's part by the 10th of September, 1842, being a condition precedent; and of no obstacle

being presented by reason of a part performance before that day, and of the defendant's inability (from the very nature of the work so performed) to place the plaintiff in *statu quo*. The latter would, I think, of itself interpose an obstacle insuperable, even if the former were clear. But I apprehend that, according to the rules by which the dependency of matters of reciprocal contract is to be determined, time was not, in this case, essential. The undertaking to complete the work by the 10th September, being a mere stipulation, not going to the whole work and consideration of the contract, and for a breach of it, compensation might be made in damages. The substance of the agreement and consideration on the plaintiff's part, was the clearing and fencing ten acres of land; all which, it certainly was incumbent upon him to perform, before he could entitle himself to demand the £5*l.* in the winter of 1844; but it does not necessarily follow that it must all be done by the 10th September, a period long antecedent to his right to be paid. As respected the work to be done, and the sum to be paid therefor in money, the contract was entire, and the condition dependent. The evidence and the verdict shew that a large portion of the work was done by the 10th of September; and the contract was in part executed on the defendant's side also, by boarding and lodging the workmen during its progress, according to his agreement. It was therefore, partly executed on both sides, and from the nature of it, the defendant could not divest himself of, or restore to the plaintiff, the work and labour he had bestowed upon his property. Time (i. e. the 10th September,) cannot therefore be said to go to the whole consideration on either side. I not only think the defendant could not rescind the agreement in *toto*, but that if he could, he did not do so. His standing on the contract, refusing to extend the time, or to permit the plaintiff to finish the job after the day, would not of themselves constitute a rescission. The defendant did not, by words or acts, indicate an intention to rescind, or to do any thing to deprive himself of his right of action, under the contract, for the breach of punctuality on the plaintiff's part, which right of action, would not remain if the agreement had been by him put an end to and rescinded. It affords a test; for, if maintainable, it proves the contract still to subsist, and to be open, though broken on the plaintiff's side. Nor do I see that his availing himself of the improvements made, and finishing a part of the clearing, &c., constituted (under the circumstances) such an act of subsequent and independent acceptance, or adoption, as to create a new relation between the parties, and to confer on the plaintiff an immediate right of action, not previously existing, for work and labor founded upon an executed consideration, and as if there were no special agreement. He could not well avoid recovering the benefit of the work, and his making use of the improvement was favorable to the plaintiff. As respected the defendant's right to claim damages, under the agreement, independent of its effect in entitling him to be ultimately paid for the value of the work itself, I do not perceive, in the evidence, what could be regarded as a separate acceptance of the work, independent of the agreement, and after it had been rescinded. If the time was conditional, and the work to be done entire, by the terms of the agreement, the defendant, by taking the benefit of what was performed, and refusing leave to the plaintiff to do more, dis-affirmed, not the whole contract, but its entirety; and by his acts and conduct, in effect, admitted that as the

plaintiff was to have been entitled to 25*l.* in the winter of 1844, provided he executed the whole work by the 10th September; so he was to be paid for whatever portion he had done by that day, less than the whole. But severing, or dis-affirming the entirety of the contract, does not rescind or annul it in *toto*; it rendered the consideration, on the plaintiff's part, divisible, and entitled him to be paid *pro tanto*. Neither do I think the plaintiff could rescind the agreement, because the defendant would not permit him to continue after the day, if entitled so to do. If the defendant had no right to prohibit him, it was a breach of the agreement on the defendant's part; but the plaintiff could not place the defendant in *statu quo.*, after doing part of the work on his lands, and recovering part of the consideration, in the boarding of himself and men. And however entitled to sue forthwith, under the contract, for being prevented completing the work, and in such form of action, to recover compensation in the shape of damages for what he had done, he could not immediately sue for such work as upon an executed consideration, and an implied promise in law to pay on request as resulting therefrom, because (though no doubt done at the defendant's request, for his benefit, and with the expectation of being paid for,) still it was so done under a special agreement, not entirely rescinded and put an end to, but upon, and by the terms of which, the period for payment had not arrived. It appears to me, that neither party did, or could, rescind the agreement on the 10th September, as matters were, without the consent of the other; and consequently, whether the *time* was conditional, or not, or whether the breach of contract was on the plaintiff's or the defendant's part, the plaintiff cannot recover in the present form of action, before the period appointed for payment. The agreement not being *rescinded*, continues open and subsists, though broken, and the work having been performed under it. The plaintiff's remedy (if entitled to one presently), is, under the agreement, delayed till the winter of 1844; when, by its provisions, the time for absolute payment will have arrived. When that period comes, the plaintiff being then entitled absolutely to immediate payment, the law, as upon an executed consideration, will raise an implied *assumpsit* and promise to pay on request, and then general *indebitatus assumpsit* may be maintained for the value of the work performed, to be estimated in connection with the special provisions and circumstances under which it was done. I take the distinction to be this: where the contract has been rescinded, general *indebitatus assumpsit* lies immediately for the *value*, regardless of the agreement; which being rescinded the parties stand as if it never had been made. When (though broken, infringed, not performed fully, or deviated from,) it still subsists open and executory on the defendant's part, then the remedy is deferred till the time for payment arrives, and then the agreement is adhered to as a guide, so far as traceable and applicable.

JONES, J.—I do not think the action can be sustained. When work is done upon a special contract, at certain prices, and the original plan is varied from by consent of both parties, the estimate is not excluded, but is to be the rule of payment as far as the special contract can be traced; and for any excess of work beyond the contract, the party is entitled to his quantum meruit. If the estimated price is to be the rule of payment, the terms as to credit must be adhered to, and this was decided in the case referred to. For the repairs of a vessel, the defendant agreed to pay,

on particular days after the performance of the work, certain sums, and the balance by an approved bill at six months. The plaintiff was allowed to recover merely for the excess of the work beyond the contract, on the quantum meruit; but not for the work done on and according to the contract; "because the mode of payment was specifically defined, and *the time for which credit was given had not elapsed;*" so here, the credit had not expired. If the plaintiff was permitted to recover in this action, a builder of a house for a large price, to be paid for two years after the completion of the work, could, by refusing or neglecting to perform his contract at the day, leaving a small portion unfinished, which would preclude him from recovering on his agreement, bring his action on the quantum meruit, and compel an immediate payment. This would not be consistent with reason or authority. In my opinion, the plaintiff can only recover in an action like the present, instituted after the term of credit has elapsed. He can bring no action on the contract, because he has not performed it according to its terms; and not for any default of the defendant, but because he himself either would not, or could not complete it by the day. In this case, I cannot but hold that time was of the essence of the contract. The object for which the land was required to be cleared, was, of course, to enable the defendant to crop it; and in order to do so advantageously, it was necessary that the seed should be deposited in the ground at a particular season. Even in equity, where, from the nature and circumstances of the contract, it follows as in this case that time is essential, it was always so regarded. And of late that court has endeavoured to restrict its power to enforce a specific contract to very moderate limits, when performance in point of time has not been strictly complied with. The judgment of Mr. Baron Alderson (*a*), appears to me clearly to establish that, in equity, time would be considered as of the essence of this contract; and if so, how can it be otherwise regarded in a court of law; when the enquiry is not merely what was the real intention of the parties, but what they have in terms expressed to be the contract. Mr. Sugden, in his Law of Vendors, 3, 266, says that in law time is deemed of the essence of the contract (*b*). And this is with regard to contracts for the purchase of estates, where it is not so strictly adhered to as in other agreements. Since writing the above, we have seen the case of *Payne v. Brown* (*c*), which fully confirms me in the opinion I had before formed. In that case, a court of equity considered time as of the essence of a contract, although the agreement was partly performed by both parties. Although no case had been decided like that in 1 Starkie, 275, I could not have brought myself to hold that this action could lie to the manifest injustice of the defendant. I should have felt warranted in adopting the principle that "the law will not work a wrong" (*d*).

HAGERMAN, J., concurred.

Rule absolute for non-suit.

(*a*) *Hopkirk v. Kingsmill*, 1 Younge & Collier, 415. (*b*) 2 Esp. 640, n.

(*c*) *Jurist*, 1843, p. 1051.

(*d*) 1 Ld. Ray. 517.

BUNNELL v. CRANE ET AL.

An agreement made to tow plaintiff's schooner, when requested, without stating such agreement to be limited in its duration ; and breach assigned in not towing in the year 1843. Plea, that the agreement was made only to be in force for the year 1842, and no longer ; and that defendants towed at all times in that year when requested. Whether such plea is bad, as amounting to the general issue.

DEMURRER.—The plaintiff declares, in assumpsit : That defendants, on the 12th day of July, 1842, in consideration that the plaintiff had then undertaken and promised to give to the defendants, the surplus freight which the plaintiff might have to transport from Montreal to Kingston, and from Kingston to Montreal, at the current rates for the carriage of such freight, undertook and promised the plaintiff to tow the schooner Prince of Wales, belonging to the plaintiff, from Lachine to Carillon, passing through the Vaudreuil locks, and from Grenville to Kingston, the plaintiff paying the government canal tolls, at 25*l.* for each trip ; and, that if the plaintiff should wish the defendants to tow the said schooner while the boats of the defendants were towing on the river or canal, then the plaintiff was to pay the defendants the sum of one shilling and nine pence per mile for such towing. And that although the plaintiff, always, from the time of the making of the said agreement and promise, did give to the defendants the carriage of the surplus freight which the plaintiff had to carry from Kingston to Montreal, and from Montreal to Kingston : yet the defendants did not, nor would (although the plaintiff was ready and willing, and offered to pay them 25*l.* for such trip as aforesaid, and although the said defendants were not towing at the time on the river and canal) tow the said schooner from Lachine to Carillon, passing through the Vaudreuil locks, and from Grenville to Kingston, or from or to either of the said places, the said plaintiff offering to pay the government tolls, according to the said agreement, although the plaintiff, on the 1st day of May, 1843, requested them to do so, &c. Plea,—That the agreement in the declaration mentioned was made to be, and was, in force and effect, for, and during, and until the end of the then current year of our Lord, 1842, to wit, until the end of the 31st day of December, 1842, and not for any other, or longer, or greater period ; and that after the making of the said agreement, and during all the time the same was in force and effect, and until the end of the said year 1842, they the defendants, did, whenever thereto requested by the plaintiff, tow the said schooner Prince of Wales from Lachine to Carillon, passing through the Vaudreuil locks, and from Grenville to Kingston, at 25*l.* for each trip, according to the true intent and meaning of the said agreement. Special demurrer, assigning as causes of demurrer, that the said plea amounts to the general issue ; and also, that it is an argumentative denial of the defendant's refusal to tow the said schooner, as in the said declaration alleged ; and also argumentative, in not stating whether the alleged tender, and offer, and request of the plaintiff, was in, or after, the said year 1842, or during, or after the time that the said agreement was in force ; and also, that it is not shewn in the said plea, that the said agreement as to time was the mutual agreement of the plaintiff and defendants.

Joinder in demurrer.

J. H. Cameron, for plaintiff.

Draper, Q. C., for defendants.

ROBINSON, C. J.—It seems to me the plea is not to be necessarily condemned, as amounting to the general issue. The defendants could not (I doubt) have safely pleaded that they did not make the promise alleged, because that would seem to deny that they ever undertook to tow the plaintiff's schooner, since that is the only promise alleged. If the agreement contained anything that would make in his favor which the plaintiff has not set out, defendants do rightly to state it, as they have done here, and to ground their defence on it. It is not decisive that the same matter might be given in evidence under the general issue; and it is not imperative in the court to hold a plea bad, even when it does amount to the general issue(a). It does not appear that the breach is sufficiently assigned (though perhaps in substance it may be); it alleges that defendants did not tow the schooner from Lachine to Carillon and from Grenville to Kingston, or from or to either of the places, although they were requested so to do; that is, plaintiff requested defendants to tow his vessel "from Lachine to Carillon, and from Grenville to Kingston, or from or to either of the places." Plaintiff should have stated a particular request to tow from some one place to another, and a refusal. If defendants had pleaded that they had never refused or neglected to tow according to the agreement, that would have admitted an agreement as general and unqualified as that set out; and a refusal in 1843 would have made them liable. They plead well, I think, that they only agreed to tow for 1842. But plaintiff assigns a breach in 1843: how are they to meet it? They perhaps could not say truly that they were not requested to tow in 1842, for they may have been requested often; then if they had been towing frequently in 1842, it surely could not be necessary that they should set out every trip they made. What then is left to them to say, but that they towed while the agreement was in force, whenever requested. But, it is said, this is only denying the breach argumentatively. How then should they have pleaded to escape that charge? I see no objection (in substance) to the declaration; a promise is a good consideration for a promise. The promise to give them all his business, I conceive, is a sufficient consideration for undertaking to do it. There is, then, a negative on plaintiff's part, and an affirmative on defendant's, making, together, a good issue. Plaintiff says defendants did not, nor would, tow from and to, or to and from, several places, although he offered them 25*l.* a trip. Defendants say they always towed when requested. Is this too general? I think not, in answer to such a breach. If plaintiff had averred that on such a day he requested defendants to tow his schooner, which was then ready to be towed from some certain place named, to some other certain place named, and offered to pay them 25*l.* for that trip, and that defendants refused, or neglected, &c.; that would have been a specific breach, to which the defendants could and must have given a specific answer. But plaintiff does not so assign any one certain breach. After setting out the agreement to tow from Lachine to Carillon, passing through the Vaudreuil locks, and from Grenville to Kingston, at 25*l.* a trip, he complains that defendants did not, nor would, although he offered to pay them 25*l.*, tow the said schooner from Lachine to Carillon, passing through the Vaudreuil locks, and from Grenville to Kingston, or from, or

(a) 4 Dowling, 337; 7 D. & R. 42.

to either of the said places, although the plaintiff, on the 1st May, 1843, requested them so to do. That is, as I read it, he requested defendants on the 1st May, 1843, to tow his schooner from Lachine to Carillon, and from Grenville to Kingston, *or from or to either of the places*, at 25*l.* each trip. I think what the plaintiff means to charge here is, a general and total failure to tow in 1843, though, on the first of May of that year, he requested defendants to keep their agreement. It seems to be a good answer to this, both in substance and form, to say as the defendants do, "the agreement you speak of was limited to 1842, you do not say you "requested me to tow at any time in that year, and that I failed; and I "say, on my part, that I always did tow in 1842, when you requested me." How can we tell but that the very point on which the parties are at issue is, that the one contends the agreement extended only to 1842, whilst the other claims that it extended to the year 1843 also. And suppose that, insisting on such a claim, plaintiff did request in 1843, and defendants refused, it would be consistent with these facts that both parties should plead as they have done. Plaintiff would designedly charge as the breach the not towing in 1843. It is very true he would not be held to that day, but might vary from it in evidence, or depart from it in pleading. Defendants could not safely take issue upon it, without setting him right as to the duration of the agreement, because they would otherwise be admitting an agreement as large as plaintiff had stated it; but I consider that they might fairly act on the assumption that plaintiff meant what he stated, and was going for an alleged failure in 1843; especially if they knew, as for all we can say they may have known, that the fact was so. Then when defendants state that their contract was only to be in force for 1842, they were right in supposing that they could not stop there, because clearly that would be to suppose that the plaintiff was held to the very time of the breach stated; and they would be attempting, by their plea, to make the time material, which they could not do; they therefore seem to have felt, and I think rightly, that they could not leave the ground uncovered during which the contract was admitted by them to be in force, but must go on, and plead as they have done, that during the time the contract was in force, they always towed the schooner when requested. This fairly put it to the plaintiff, if he did not mean to be bound by his statement of time, but had occasion to depart from it, as he might do, to state that the breach of which he had complained took place on some day in the year 1842, and so assign a particular breach within that year; and then the defendants could reply to this corrected statement, by shewing performance or denying the request; they would then have a specific breach to reply to, laid within the year to which the agreement, as they allege, extended. No such specific breach in 1842 having been charged in the declaration, they could not do otherwise than plead as they have done, that during that year they always towed when requested. They could not, in my opinion, have pleaded that though the plaintiff had laid a breach in 1843, he meant to allege a breach in 1842, and then supposed some occasion in that year in which plaintiff meant falsely to charge a breach, in order to plead performance on such particular occasion. The declaration, in my opinion, is well answered, and I think defendants are entitled to judgment.

MACAULAY, J.—It is not stated, in these pleadings, where the vessel was, and perhaps the omission might have been objected to on demurrer,

but it has not. Taken distributively, the breach is, that defendants did not nor would, though requested, tow the said vessel *from Lachine to Carillon*, and from Grenville to Kingston, *or either* from Lachine to Carillon, *or* from Grenville to Kingston. The plea is, that the agreement ceased on the 31st of December, 1842, and that during all the *time* it was in force, and until the end of 1842, defendants did, *whenever thereto requested by plaintiff*, tow the said schooner from Lachine to Carillon, and from Grenville to Kingston, at 25*l.* a trip, according to the true intent and meaning of the said agreement, verification, &c. Time not being material, the defendants should have singled out a particular time as the occasion in question, and answered it by pleading performance, or denying it, or by confessing and avoiding it, as that the time and refusal complained of were in 1843, wherefore they refused. If the defendants meant to confess and avoid the request and refusal, or breach alleged, or to deny them, they should have done so in express terms. The breach, in substance, is, that at a certain time they were requested to tow, and wholly refused. The plea is, that they did tow at all times when requested. The breach assigned is not confessed and avoided, nor is it expressly denied or met by a plea of specific performance. The breach in terms, is, that defendants did not tow, although requested, on a particular occasion; i. e., though specially requested. The plea is, that they did tow at all times when requested. If there was a request and refusal in 1843, the defendants should have admitted and avoided it; if no refusal at any time, the plea should have been that they did tow, or were not requested to tow, *modo et formâ*. As it is, the plea does not answer an alleged default upon a special request. Had plaintiff taken issue on the alleged limitation of the agreement to 1842, and it were found for him, i. e., that it was not made to be in force only to the end of 1842, and no longer, it would be an immaterial issue, because it would not follow that they had committed any breach at any time, for *time* is not confessed or admitted. The object of the plea is, impliedly to deny it. If plaintiff had laid the breach on 1st August, 1842, and defendants had pleaded as they have done, it would not be an explicit answer of the breach assigned; it would be too large. If defendants had pleaded performance at the time when, or denied the request alleged, and the agreement extended to 1843, and a request and refusal was shewn in 1843, it might be proved under such issue (time not being material as laid to the breach assigned): this shews that the breach assigned is not answered, except argumentatively. As to the objection to the declaration, that it alleges a part consideration, it cannot be well founded, because there is a substantial prospective consideration, viz.: 25*l.* a trip, or one shilling and nine pence a mile for towage, according to circumstances; and the consideration objected to, though inducement to the contract, does not in reality constitute the only consideration for which the defendants were to tow, so as to give to the transaction the character of a *nudum pactum* agreement (*a*). A part consideration as "had agreed" is sufficient to support a promise, if at the defendant's request, and such a request is clearly implied though not expressed in this case. The whole consideration for the defendant's promise is stated, and it is not alone past or

(a) 1 Bing. N. S. 490. Wilkinson vs. Oliveira.

executed, but partly prospective, and the plaintiff is only required to state the whole consideration for the promise laid, the entire consideration for the act, and the entire act which is to be done by virtue of such consideration (a). But a distinction is said to exist between a plea that amounts to the general issue, and a plea of facts that may be given in evidence under the general issue; and a plea admitting the contract as laid in all its terms, but limiting its duration in point of time, is consistent with the agreement stated, and does not amount to the general issue (b). That was assumpsit for breach of warranty of a mare sold, and a plea, alleging that by the condition of sale, usual at the place of sale, it, the warranty, was to be deemed complied with, unless notice of unsoundness was given within a stated time; held good on demurrer. A similar distinction seems to me applicable to this case. The plea denies no part of the agreement as laid, it only qualifies its duration; and its being for a year only would not be a fatal variance at the trial, if a breach were shewn within that period, as might be done under the general issue before the new rules, time as laid not being material. I do not think, therefore, that the plea does amount to the general issue. I see no ground for alleging the want of mutuality in that part of the contract which relates to its continuance any more than the other portions of it.

JONES, J.—I think the plea is an answer to the breach. The breach is, that the defendants would not tow the schooner from Lachine to Carillon, and from Grenville to Kingston, or *from* or *to* either of these places, although requested so to do on the 1st May, 1843. The defendants say, we did not agree to tow your schooner except in 1842, and during that year we towed the schooner whenever requested. I think the breach is bad, it is too extensive. The contract was to tow from Lachine to Carillon, and from Grenville to Kingston. The breach is, that they did not tow from Lachine to Carillon, and from Grenville to Kingston, or *from* or *to* either of *these places*; proof, therefore, that the defendants did not tow from Kingston to Grenville would support the breach; and the contract was not to tow from Kingston to Grenville, but from Grenville to Kingston.

**DOE DEM. MELIAN MARIANNE, GUARDIAN OF ISABELLA ODELL MARIANNE,
AN INFANT, v. ALEXANDER.**

A guardian appointed by the Vice Chancellor, upon petition of an infant, cannot make a demise for the purpose of trying the title to the infant's land in ejectment. The demise should have been by the infant.

EJECTMENT FOR LANDS, IN THE CITY OF TORONTO.—The demise laid is by Melian Marianne, guardian of Isabella Odell Marianne, an infant, and is stated to have been made on 1st April, 5 Vic., to hold for seven years. Paul Marianne, by his will, devised these premises to his wife, Jane Marianne, for life, with remainder to his son William, in fee. William Marianne is since dead, leaving Isabella Odell Marianne, his only child and heir. On the 21st May, 1840, Jane Marianne (then Jane Jordan), the widow, made a lease for twenty-one years to the defendant, Alexander, and in February or March, 1843, she died. The infant, Isabella Odell Marianne, is now about sixteen or seventeen years old. In June, 1843, she preferred her

(a) 6 East. 570. 8 East. 7.

(b) 8 M. & W. 723. Smart *vs.* Hyde.

petition to the Vice Chancellor, stating that she was then about fifteen years of age, that her father was dead, that she was seised of an estate in fee in the city of Toronto, yielding about 30*l.* annual rent : that her mother Melian Marianne (lessor of the plaintiff) was willing to be guardian, and she prayed that her mother might be accordingly appointed her guardian, which was done by an order in chancery made on that day. It was objected at the trial, that the guardian thus appointed did not legally represent the infant, and certainly did not represent the estate, and could not therefore make the demise laid in the declaration. A verdict was rendered for plaintiff, with leave to move for a non-suit on this point, which was afterwards moved.

ROBINSON, C. J.—It is very difficult to gather from the books, any clear account of what the several descriptions of guardian may do, in regard to the real estate of the infant. It is acknowledged by writers to be an obscure part of our law, and it certainly appears to be so. If we could regard this lessor of the plaintiff as a guardian appointed by the infant, being tenant in soccage after the age of fourteen, then certainly the passage in Bac. Abr. Leases I. 9, and repeated in the same work, Guardian A. 1, is strong to shew that this demise would be good. I apprehend these passages to have the authority of D. C. B. Gilbert. And there is also authority for holding, that the guardian in soccage continues after the infant attains to the age of fourteen, if another guardian is not appointed by election of the infant, or otherwise ; though the general run of authority seems to be against that position. In Mr. Hargrave's note to Coke, Litt. 88. (note 12), it is assumed that when the right of guardianship in soccage and guardianship by nature meet in the same person, as they did here in the mother, the latter yields to the former. Till the age of fourteen, therefore, the mother was in this case guardian in soccage, and when the infant attained to the age of fourteen, the mother would become guardian by nature till the infant's age of twenty-one, in case of no appointment of guardian being made ; but such guardianship by nature, in Mr. Hargrave's opinion, extends only to the custody of the infant's person (*a*). When guardianship in soccage ceases, that is at the age of fourteen, and where no testamentary guardian has been appointed according to the statute 12 Car. 2. ch. 24, the infant may elect a guardian, according to the practice which seems to have prevailed in some degree before the Restoration ; and for the mode of this election there seems to be no prescribed form. It is doubted even whether an appointment by parol would not be sufficient (*b*). And further, it seems that by a practice of uncertain origin, both as to time and authority, (but now unquestionable), the Chancellor may appoint a guardian when the law has not appointed one ; and as I suppose, after fourteen, where there has been a guardianship in soccage. Guardians so appointed, are for the protection both of the person and estate ; and it is even said that the Lord Chancellor may appoint a guardian, if good reason should appear, notwithstanding the existence of a guardian in soccage. With regard to the power of guardians so appointed, it is stated that they can make no leases, except by the sanction of the court. But a guardian chosen by the infant himself, after the age of fourteen may, as I conceive, by the laws of England

(*a*) Co. Litt. 886, note 12.

(*b*) Co. Litt. 88, note 16.

make a demise ; for he is to have charge of the estate, as the guardian in soccage had ; and I apprehend it would probably be held in England, that a guardian appointed by the Lord Chancellor might, without the special sanction of the court, and without question, that a guardian elected by the infant may, make a demise for the purpose of trying the title in ejectment. Having stated these few principles shortly, we must consider what has been done in this case. The Vice Chancellor, assuming that he may appoint a guardian as in England, under the general jurisdiction given to his court, has, upon the petition of the infant, after she had passed the age of fourteen years, appointed the mother, the lessor of the plaintiff, to be guardian. If that were a valid appointment, I think I should conclude that the demise may be supported. But a fair construction of the second clause of the Chancery Act, 7 Wm. IV. ch. 2, compels us, I think, to hold that in this matter of appointing guardians the court cannot exercise the jurisdiction which belongs to the Lord Chancellor in England. By that clause the court, it is declared, shall have jurisdiction "in all matters relating to infants, idiots, and lunatics, and their estates, "except where special provision hath been, or may hereafter be made "with respect to them, or either of them; by any law of this province." Our statute 8 Geo. IV. ch. 6, is a law of this province, making special provision in that "matter relating to infants and their estates," which concerns the appointment of guardians ; and so much, therefore, of the jurisdiction which would otherwise have belonged to the Court of Chancery in Upper Canada, has been withheld from it. If there had not been this special provision made, then the appointment which has been made by the court would seem to be valid, and I should conceive that the guardian so appointed might have demised for the purpose at least of trying an ejectment. But as it is, the statute 8 Geo. IV. appears to me to have the effect, under the proviso contained in the second clause in the Chancery Act, of depriving the Court of Chancery of the power to appoint guardians to infants ; and we cannot sustain this appointment by assuming, as was contended in the argument in favour of the jurisdiction, that the infant in this case was residing abroad, and that it was therefore not a case within the 8 Geo. IV. ch. 6. That would be entertaining an inference against what is in proof before us, for the petition is of an infant residing in the province ; and as it is the office of a guardian to take care of the person and education as well as of the estate of the infant (*a*), it would not be a natural supposition that the court had been asked to appoint a guardian to an infant residing in another country. It then remains a question, whether the petition of the infant to have her mother appointed guardian, though it could not lead to a valid appointment by the court, may not yet be in itself a sufficient election on the part of the infant, to have effect, as in England, where an infant after the age of fourteen elects her guardian. Following the principles which may be gathered, though not clearly and without contradiction, from the books, as I have already stated them, I think we might take this as an election by the infant, sufficiently made and expressed, and that a guardian, so nominated, might demise the estate during the minority of the infant. But I am of opinion that our statute 8 Geo. IV. ch. 6, creates a difficulty in the way of

(*a*) See 8 Geo. IV. ch. 6, sec. 2.

our so regarding it; for it seems to me that we must look upon this statute as pointing out the one regular and proper legal mode of appointing guardians in this province, superseding those by election of the infant, as well as by order of the Court of Chancery. We may hereafter see occasion to conclude differently upon this effect of the statute as a general question, but as regards the right to sustain this ejectment upon this demise of the mother as guardian, it stands on such doubtful ground, even upon the English authorities, that I fully agree with my brothers in the opinion, that we cannot satisfactorily maintain the verdict. There should be a new trial, with leave to plaintiff to add a count on the demise of the infant, on payment of costs (*a*). On demise by an infant, his guardian should be made plaintiff instead of John Doe, in order to save the trouble of giving security for costs (*b*).

JONES, J.—I see no authority for a guardian, by appointment or election, to demise. In McPherson upon Infants, 309, it is stated that “a guardian in soccage may make a lease for years of the infant’s lands, to last till the infant attains the age of fourteen; that a customary guardian may make leases warranted by the custom, not exceeding the duration of the guardianship; and that a guardian, under the statute 12 Car. 2, can make leases to last till the infant attains twenty-one.” It is stated in Bacon’s Abridgment, that “the guardian in soccage may make leases for years, to continue beyond the time of his guardianship, not being void by the infant’s coming of age, but only voidable by him if he thinks fit.” But in *Wade v. Baker et al.* (*c*), recognised in *Rea v. Sutler* (*d*), the power of the guardian in soccage was considered as restricted to the age of fourteen, and in *Roe dem Parry v. Hodgson* (*e*), it was laid down by the court that the offices of testamentary guardian up to twenty-one, and of guardian in soccage, are the same, and that a lease for years by a testamentary guardian is absolutely void when the heir attains the age of twenty-one years; it follows therefore that a lease for years by a guardian in soccage must be absolutely void when the infant attains the age of twenty-one years. Mr. McPherson adds “There does not appear to be sufficient authority for attributing to any other kind of guardian (referring to guardian in soccage, testamentary guardian, and guardian under the statute 12 Car. 2.) the right, independently of express powers contained “in a legal instrument of making leases, by which any “estate in the infant’s land is created, a guardian by nature can only “make a lease at will, and guardians by the election of the infant, as well “as guardians appointed by the court, in a suit, or without a suit, are “equally powerless.” Upon the whole, I think that this guardian, if legally appointed, either by the Vice Chancellor or by the election of the infant, has not the power of leasing the infant’s land, and therefore that the lessor of the plaintiff cannot recover upon this demise. The infant, alone, after the age of fourteen in this case, can demise so as to recover in ejectment.

Rule absolute for non-suit.

MACAULAY, J., and HAGEMAN, J., concurred.

(*a*) See Strange, 694; 1 Wils. 130.

(*b*) See 3 Burr. 1806; 2 H. C. 160; Adams on Eject. 67.

(*c*) 1 Ld. Ray. 131.

(*d*) 3 Ad. & Ell. 597.

(*e*) 2 Wil. 129.

BROWN *v.* STREET.

Whether long possession of an easement in land, though it may not supply evidence of a grant, may be received in support of a plea of leave and license. New trials will not be granted upon the extreme right of the party merely, but only to advance the substantial ends of justice.

Case for overflowing land by defendant's mill-dam, lower down the stream than plaintiff's. Defendant pleads general issue. 2nd. That plaintiff was not seised in fee of the locus in quo. 3rd. Leave and license. Plaintiff takes issue on all. Verdict for defendant. Plaintiff moves to set it aside for misdirection.

J. H. Cameron for plaintiff.

Gwynne for defendant.

ROBINSON, C. J.—The question is, whether evidence that defendant had been allowed for more than twenty years to keep up his dam at the height now complained of, could avail him as a defence on either issue. It is contended that defendant gave no evidence of title to the land overflowed, which could enable him to succeed on the 3rd issue; and 2ndly, that twenty years' possession of an easement (supposing that to have been proved) was not evidence to support a plea of leave and license. It seems the jury found that the dam was not higher than the plaintiff allowed it to be when erected more than twenty years ago. And upon the merits, looking at the evidence and the points submitted to the jury, there could be no good ground for disturbing the verdict which has been given for the defendant. But this application turns upon a strictly legal question, which seems to have been raised and insisted upon at the trial. There is no doubt that the defendant (or those under whom he claims,) was permitted more than twenty years ago to overflow the plaintiff's land to a certain extent for the purpose of working his mill; and that the privilege thus conceded has been used and enjoyed for more than twenty years. At the trial the fact in dispute, and upon which much evidence was received on both sides, was, whether an alteration which the defendant had recently made in his dam, has the effect or not of raising the water higher than the plaintiff gave leave to raise it more than twenty years ago. The jury found it did not; but the plaintiff urged at the trial, that even admitting this to be so, yet such alleged leave of the plaintiff given twenty years ago, was neither evidence to disprove his seisin in fee of the land overflowed, which was one of the issues, nor evidence upon the other issue of leave and license, because to support that defence of a license given to commit a nuisance upon the plaintiff's land, a grant under seal must be shewn; that leave otherwise given can only be sufficient where it applies to permission to a party to do something on his own land, which by its consequences may injure the plaintiff's land. The distinction, I apprehend, is a clear one, and is in accordance with authority; for such a leave amounts to the demise of an incorporeal hereditament (*a*); but it appearing upon the first impression to the learned judge, that this was not a case in which that principle could be applied, under the evidence given at the trial, the objection was over-ruled; and the first question is, whether in a case, where the damages at any rate must be very trifling,

(*a*) 4 Nev. & Man. 505.

and where, in the opinion of the jury, there was really no cause of action, we are bound to set aside a verdict, and grant a new trial for the misdirection, there having been no point reserved. If there should be a new trial, we could hardly refuse to allow the defendant leave to alter his pleadings, if by so doing he could avail himself of what is in truth a just and meritorious defence. It appears that the crown, so long ago as in 1797, had granted, by letters patent, to John Brown, seven hundred acres of land, embracing the tract in which his son, Adam Brown, the plaintiff, complains the injury has been committed, by the defendant's mill-dam backing water upon it. And in 1818, this plaintiff, Adam Brown, then the owner of the fee, made a deed to John Brown, for a consideration of £500, of two hundred and thirty acres of the tract which his father had owned, consisting of parts of Lots 64 and 65 in Thorold, and part of a lot in Pelham, "and so much of the gore lot in Thorold as will be overflowed by a mill-dam, which the said John Brown is inclined to erect." Now, it is not denied, that Adam Brown was, at the time of making this deed, the owner of this gore lot, and therefore fully competent to grant any right connected with it, or any privilege in it. And it is equally clear, that by this deed, he did intend to grant to John Brown so much of the gore lot as he might have occasion to overflow with water by a mill-dam which he proposed to erect, and that he made this grant for a valuable consideration. In December, 1840, John Brown gave a bond to John Street, under whom this defendant claims, in a penalty of £500, with a condition that he should allow the said John Street, his heirs or assigns, "as much of the gore lot as will be overflowed by a mill-dam, according to a deed made to the said John Brown by Adam Brown, dated, &c." It appeared, that more than twenty years before this action was brought, boundaries had been placed to mark the height of water agreed upon, as necessary for the purposes of the proposed mill. If there has been any overflowing beyond those late boundaries, within the last two or three years, as the plaintiff contends there has been, and for which this action is brought, it was clear from the evidence that the injury occasioned by it was trifling: but that there had been any excess was the point denied by the defendant, and to which the evidence of many witnesses produced at the trial applied. The jury found there had been no excess beyond the privilege formerly enjoyed; and having read the evidence, and considering the nature of the action, we should no doubt hold the plaintiff bound by that verdict, so far as that question of fact is concerned. But then the plaintiff contends, that the defendant had no plea on the record, under which he could avail himself of this defence, which he honestly had in point of fact; assuming, which we now do, that the verdict upon the mere fact was a true and just verdict. If this were so, and there was in this respect an error in the ruling at nisi prius, it is not to be taken as a matter of course, when there has been no point reserved, but the objection taken was over-ruled, that we must set aside the verdict, and grant a new trial upon the point of *summum jus*, and to gratify a litigious spirit in order to give the plaintiff an opportunity of recovering contrary to the justice of the case, in an action which should never have been brought. But we do not see that the plaintiff's objection was entitled to prevail. The deed of this plaintiff may not operate to pass the estate in the land intended to be overflowed, by reason of uncertainty to what land it could

be applied, but it may well operate as a license under seal to overflow the land, or as the grant of an incorporeal hereditament (the easement in the land) to John Brown and his assigns. And it would at any rate be so manifestly unconscientious in the plaintiff, admitting that there has been no excess, to bring an action now against any one using the privilege to no greater extent than he had granted it in 1818, that we can certainly not further his action by any interposition of ours in granting him a new trial.

Rule discharged.

MACAULAY, J., JONES, J., and HAGERMAN, J., concurred.

CHAMBERLIN v. CHAMBERS.

A. gave his note for a debt justly due by him, untainted with usury, which note was indorsed by B. to C. upon usurious terms, and A. afterwards makes a mortgage to C. to secure the amount payable by the note with interest. Held, that although the mortgage was given only to secure what A. was legally liable to pay in the first instance, as maker of the note, yet C. could not recover upon it, because he had taken it to secure the debt arising from his usurious discount of the note.

Plaintiff sues in debt on a mortgage given 1st Nov., 1841, by defendant, conditioned to pay to plaintiff 79*l.* 19*s.* with interest, on 1st Nov., 1842. Defendant pleads, that on 3rd March, 1840, it was corruptly agreed between plaintiff and J. G. Armour, that plaintiff should lend Armour 70*l.* 19*s.* 1*d.* to be paid on 4th of June then next, and should receive 1*l.* 16*s.* 5*d.* for interest, being excessive; and that Armour, to secure the loan, should indorse a note before then made, dated 3rd March, 1840, payable in ninety days to the order of one W. Sommers, for 72*l.* 13*s.* 6*d.*, and endorsed by Sommers to Armour; that Armour afterwards, viz.—on 3rd March, 1840, indorsed the note to plaintiff on those terms, who being the holder of the note, when due required and took from this defendant, as maker of the note, the mortgage now sued on for the security of the sum payable on the said note. Plaintiff pleads, denying the corrupt agreement. The defendant had a verdict, and plaintiff moved for a new trial, on the law and evidence, and for misdirection. The facts were these:—Armour having a demand for money against this defendant Chambers, and one Sommers, amounting to 71*l.* 11*s.* 8*d.*, Chambers gave his note, endorsed by Sommers for 72*l.* 13*s.* 6*d.*, payable in ninety days, which included interest for the ninety days the note had to run. This note was given on 3rd March, 1840. Armour procured the plaintiff Chamberlin to cash this note, and agreed to allow him 10 per cent. for the discount. He received from him 70*l.* 17*s.* 1*d.*, thus submitting to a deduction of 6 per cent. for the ninety-three days the note had to run, including the three days' grace, and of 4 per cent. on the balance that remained after deducting the 6 per cent. Armour endorsed the note, when he transferred it to Chamberlin, and was sued by him as indorser when it fell due; but security being received by Chamberlin from the maker of the note, that suit was not proceeded in. The security thus given was a mortgage from Chambers to Chamberlin, which covered only the amount which Chambers really owed as maker of the note for principal and interest. Upon these facts it was strenuously contended at the trial, that the objection on the ground of usury did not lie, because this

defendant Chambers had given this mortgage only for a debt which he really owed, not including any usurious interest.

Gwynne for plaintiff.

Armour for defendant.

ROBINSON, C. J.—The case was tried before me, and I ruled that it was clearly a case under the statute, for though it is true that Chambers gave the mortgage on which he is sued to secure a legal debt, untainted with usury, so that nothing really is demanded of him in this action more than he is legally and justly liable to pay, yet this plaintiff Chamberlin is seeking to enforce, for his own benefit, a security which in regard to the sum claimed by him does include usury. The transaction between Chamberlin and Armour was clearly usurious, for it was not the mere sale of the note of a third party; Armour obtained this money upon the security of the note indorsed by himself, which indorsement made him, as it were, the maker of a new note for that amount. The note in its terms was made by Chambers payable to Sommers, or order, and therefore it did not require Armour's indorsement for the mere purpose of transferring it. His indorsement was required as additional security, and was given for that purpose; and his liability was insisted upon by the plaintiff, who only released him on obtaining this mortgage for the whole amount which he could have obtained on the note. Chamberlin, under such circumstances, could not have recovered on the note, either from this defendant or from Armour, because he had received it upon an usurious agreement; and that being so, he can no more sue upon this mortgage, which is merely a substituted security for the same debt (*a*). It was objected at the trial, that the agreement as proved in evidence did not exactly agree with the agreement set out; but it appeared to me that the plea was correctly framed to meet the case, except that there was doubt regarding one particular, namely, the time for which payment was to be forborne. It was pleaded that the loan was made on 3d March, 1840, and that the forbearance was to be from that day. Mr. Armour, who obtained the money from Chamberlin by discounting the note with him, spoke uncertainly as to whether he did not discount the note some days after it was made, and not on 3rd March, being the day on which it was made as the declaration stated; but on being further examined on that point, so far as his recollection served him, he said he thought he obtained the money a few days after the note was made, but he was not sure; and according to an entry in his book, it would seem that he had received the money from plaintiff on the 3rd March, and in the end he seemed to think his entry was correct. I told the jury I could not say that the money was proved to have been advanced on a different day from that named, and could not, therefore, rule that a variance had been shewn; but it was left to them, as part of the case, and they found for defendant. Under these circumstances, I am of opinion that we ought not to disturb the verdict on any objection of this kind. If the declaration in this respect had been disproved, the plaintiff must have been non-suited, but the evidence was not positive either way; and if the money was not lent till a few days later, the excess above legal interest would have been so much greater.

(*a*) *King v. Ridge*, 4 Price, 50.; *Tate v. Willing*, 3 H. C. 538.; 2 B. & Ad. 588.; 7 M. & W. 370.; 9 Dowl. 213.; 6 Jurist, 464.

JONES, J.—The rule must be discharged. It is quite clear, from the authorities referred to, that the indorsement from Armour to the plaintiff of the promissory note, upon an usurious consideration, gave no interest to him; and therefore he could sustain no action on the note. The mortgage in question, was a security for the payment of the money loaned upon the usurious contract, substituted in place of the note; and the authorities are equally clear to shew that the plaintiff cannot recover upon it, any more than upon the note; if he could do so, it would be easy, by a change of security, to avoid the effect of the statute. From the report of the evidence by the learned Chief Justice, I think the contract was proved as laid, and as found by the jury.

Rule discharged.

MACAULAY, J., and HAGEMAN, J., concurred.

CORBETT v. JACKSON.

A complaint addressed to a public body, or to the Government, respecting the conduct of an officer, whose conduct the Government or such public body may have the power of controlling, is not necessarily a privileged communication. That depends on the motives with which such communication is made.

ACTION FOR A LIBEL ON PLAINTIFF, DEFAMING HIM IN HIS OFFICE OF SHERIFF OF THE MIDLAND DISTRICT.—The libel was contained in a written paper signed by defendant, and addressed “To the Mayor and Commonalty of the town of Kingston, in council assembled;” in which he stated “that at the late election for Ward No. 4, in this town, Mr. Sheriff Corbett (the plaintiff) did use his influence at the poll; that he used threats and intimidation, and in some cases personal violence, in hindering voters from coming to the poll; that such conduct on the part of a sheriff is illegal, and subversive of the freedom of elections, and should not be tolerated; that witnesses were forthcoming to prove the statements contained in this paper, and that he respectfully requested the notice of the council thereto.” In another count the plaintiff complained of another libel, which was contained in a letter or memorial, addressed by defendant to the secretary of the government, in which he stated “that at the late election Mr. Sheriff Corbett did appear at the poll as a violent partisan; that he did use violent threats and intimidation to many of his (the defendant's) supporters; that such conduct on the part of the sheriff, was illegal and subversive of the freedom of election, and should not be tolerated;” adding, as in the other paper, “that he had witnesses to support his statement, and requesting the notice of the government thereto.” This letter was officially communicated by order of the Governor General, to the plaintiff, for his observations thereon. Defendant pleads the general issue; and to the first count, a special plea, that the plaintiff did misconduct himself as sheriff at the ward election, in the manner complained of in the alleged libel set forth in that count, and that for that cause he made the statement to the mayor and commonalty, in order that they might take measures to secure the freedom of election in the town of Kingston, for the future. It was proved, on the trial, that the letter addressed to the mayor, &c. had been read publicly in open sessions at the common council, but no further proceedings were taken upon either statement. The defendant called witnesses to support his plea of justification to the first count. This evidence went by no means the

by evidence called for the plaintiff. The learned judge directed the jury, that unless the libel charged in the second count should be considered to be a privileged communication, the verdict must be against the defendant, because to that count he had merely pleaded denying the publication of the alleged libel, and had not pleaded the truth as a defence. That if the libel charged in the first count was a privileged communication, or if the facts charged in it had been proved to be true, the defendant would, on either ground, be entitled to a verdict in his favor. That the defendant had a right to represent to the government, or the corporation, any matter of just complaint against the conduct of plaintiff in the course of the election, and that if he thought he had such ground for complaint, he would be justified in making it; but that if the communication was made maliciously and in bad faith, and not in order to prefer a complaint which he believed well founded, it would not be considered a privileged communication, and the defendant would be liable for damages. The jury found a verdict for plaintiff, and 125*l.* damages; and defendant moved for a non-suit, on leave reserved at the trial for that purpose, or for a new trial, on the ground of mis-direction, and for excessive damages.

Henderson, for plaintiff.

Kirkpatrick, for defendant.

ROBINSON, C. J.—We are of opinion that this case went to the jury with a proper direction from the learned judge who tried the cause; and seeing the charge which was given to them, we must infer that the jury found the statements made by the defendant to have been maliciously made, without facts to warrant them; not made *bonâ fide* in the exercise of his privilege, believing them to be true, and with a view to obtain redress either at the hands of the government or of the corporation, but made in the wilful abuse of that privilege, and with a view of unjustly defaming the defendant. Without noticing particularly the case of a petition preferred to either House of Parliament, which this is not, it is sufficient to say that this is the very ordinary case of an individual having an interest in a subject matter, making a complaint of the conduct of another person in respect to it, and preferring his complaint to a quarter in which he might reasonably hope to obtain redress. If the plaintiff had in truth misconducted himself in the manner imputed to him, it would have been natural, and therefore excusable, to represent his misconduct to the city council, either as affecting the election and return which had been made, or with a view to call their attention to the necessity of protecting the independence of future elections by bye-laws, or other measures which they might find it possible to adopt. So also he might justifiably have represented the matter to the executive government (as he has done), because the sheriff was their officer, holding his commission during pleasure, and subject to be removed for any corrupt or oppressive use of the influence which is inseparable from his office. But a great number of cases in modern times have established the principle, that a person is not to be allowed with impunity maliciously to defame another, merely because he does it under the cover of an assumed necessity of preferring a complaint against a public officer or other individual, in order to obtain redress. The motives to such a complaint may be brought in question before a jury; and the grounds of it in point of fact may also be called in question, as throwing light upon the motives: of course it does

not follow that the fact of a complaint turning out to be groundless is to make the author of it liable in an action for libel. If the statement being true would have warranted the publication on the part of the defendant, then a sincere impression of its truth would equally defend the author of it, under the same circumstances, from the charge of malice, and so would protect him against an action. The jury, in this case, must have found that the defendant made very grave charges against the plaintiff, when there was either no pretence for such charges, or at most a very frivolous pretence; and they must have found further, that the defendant did not act sincerely and in good faith, under the belief that he had been injured; but had wantonly and maliciously assailed the character of the plaintiff, without having, or caring to have, any reasonable ground for his attack. We cannot say that the evidence did not justify their taking this view of the case, and if they did so regard it, then although a verdict for a smaller sum might have sufficiently answered the ends of justice, yet we should not be warranted in looking upon 125*l.* as excessive damages, and such as call for the interference of the court on that ground. The case of *Robinson v. May* (*a*), and of *Fairman v. Ives* (*b*), are strongly in support of this action; and there are many later authorities. In the latter case the defendant had addressed a letter to the Secretary at War, charging an officer of the army on half-pay with dis-honourable conduct in relation to certain bills of exchange, and praying that the Secretary at War would use his influence, by ordering the officer to discharge the debt. The court say "this was a communication not for the purpose of slandering, but for the purpose of obtaining redress for an injury, and made to a public officer *who it was supposed* had the means of giving such redress;" and they were of opinion that the letter having been written (as the evidence shewed) for the purpose of obtaining redress, the plaintiff was not entitled to recover; and Best, C. J., says: "neither the officer nor the king could give the defendant direct assistance in recovering the money wrongfully withheld; but the king had authority to dismiss an officer from his service, and most probably would dismiss any one who hesitated to do what honour and justice required. In the present case, there was at least probable cause for thinking that the Secretary at War could advise his Majesty that the plaintiff was not worthy to remain in the army unless he did the defendant immediate justice." After enumerating the various representations which parties may make by petition or otherwise to his Majesty, or the several departments of the government, or to either house of parliament, his lordship observes: "All these are protected, in order that none may be prevented by the dread of prosecution or action from making communications which may be either important to themselves, or beneficial to the public. This privilege, however, must not be abused: for if such a communication be made maliciously, and without probable cause, the pretence under which it is made, instead of furnishing a defence, will aggravate the case of the defendant." These principles clearly maintain the present action, and we are of opinion this rule must be discharged.

MACAULAY, J., JONES, J., and HAGEMAN, J., concurred.

MONTREAL BANK v. BURNHAM.

Proceedings had in suits against an absconding debtor, contrary to the provisions of the statutes, may be set aside at the instance of other creditors of the absconding debtor.

Motion that ca. re., and all proceedings thereon, be set aside for irregularity, the ca. re. having issued within three months from the issuing of the attachment—with costs. Moved, on affidavit of Mr. Gamble, who describes himself in the affidavit as attorney for the Bank of Upper Canada, for W. Williamson and other persons, against this defendant as an absconding debtor, that this cause was commenced by attachment; he annexes copies of proceedings in this cause, and swears that he believes no service of process in this cause was ever made on the defendant. Attachment sued out 19th of August, 1843; ca. re. issued same day; plaintiffs declare 19th September, 1843; common bail filed by plaintiffs for defendant 5th of October, 1843; affidavit of bailiff that on 19th of August, 1843, he served the ca. re. on defendant, by leaving it at his last place of abode; interlocutory judgment signed on the 5th of October, and damages assessed thereon.

MONTREAL BANK v. BURNHAM.

Motion to set aside the ca. re., and subsequent proceedings, for irregularity, ca. re. having been issued within three months from the issuing of the attachment. Declaration filed before common bail and agreeing with writ; attachment issued 19th May, 1843; ca. re. issued 14th June, 1843; alias ca. re. issued 19th of August, 1843; served same day, *by leaving it at defendant's last place of abode*; declaration filed 18th of September, 1843; common bail filed plaintiff for defendant 5th of October, 1843; interlocutory judgment signed same day. Affidavit of Mr. Gamble as in former case, that this cause was commenced by attachment, that he is attorney for other attaching creditors (or rather in this affidavit, as in the other, he merely describes himself as attorney for the creditors, naming them).

Draper, Q. C., for plaintiff.

Gamble for attaching creditors.

ROBINSON, C. J.—There can be no doubt that the suing out mesne process against an absconding debtor in a suit commenced by attachment, and before three months have elapsed after the publishing of the attachment, is irregular, because it is directly contrary to the provisions of the statute 2 Will. IV., ch. 5 (a). The 5th and 6th clauses of that statute direct the method of proceeding against an absconding debtor, in order to obtain judgment. Nothing can be done until notice of the seizure under the attachment has been published by the sheriff for three months. The debtor has till that time to return within the jurisdiction, and to put in bail (sec. 2); and if he fails to do this, then the proceedings in the action so commenced by attachment shall proceed as in other suits: process is to be taken out, and served by leaving a copy at the debtor's last place of abode in the province, with a grown-up person there, *and also by affixing*

(a) *Banker v. Griffin, Q. B. Easter Term, 3 Will. IV.*

a copy in the crown office, which does not seem to have been done here. Here it is shewn, in the first of these cases, that the suit was commenced by suing out an attachment on the 19th of August, 1843; that a ca. re. issued the same day, which was *left at* the debtor's last place of abode, declaration filed 19th of September, and interlocutory judgment signed 5th of October, so that plaintiffs have got judgment before they were entitled to sue out their ca. re.'s. This is directly contrary to the statute. It is unfair towards the debtor, who is allowed three months before these proceedings can be taken behind his back, his property being seized and held in the mean time; and it is unfair towards other persons having claims against the estate, because they are interested in the debtor having all the time and opportunity which the statute allows him for defending himself against the claim of any creditor proceeding against him in his absence. And by the 5th clause of 5 Will. IV., ch. 5, such other creditors may, on behalf of the estate, make any defence against the plaintiff's demand that the debtor himself could, if present, and may prove a set-off. This provision gives to all the creditors, who have sued out attachments, a legal interest in the proceedings, and a right to insist that no undue advantage shall be taken in urging on any particular suit. I am therefore of opinion, that when we are informed by other attaching creditors, that some one of them is proceeding in direct violation of the statute to obtain judgment, without those formalities which the statute enjoins, we are bound to interpose as much as if the debtor made the application. I am of opinion also, that it sufficiently appears to us that there are other attaching creditors, when the affidavit describes the deponent as the attorney for such creditors, and names them. And when our attention is called to the fact, we must see that the positive provisions of a public statute are not disregarded by proceedings illegally conducted against an absent person. These proceedings are a perfect nullity; they are not merely irregular. If it were necessary, we must only have called upon the party recovering to file another affidavit stating the fact more particularly of the pending of other suits, and of his being retained on behalf of the plaintiffs in those suits. But I think this is already before us sufficiently. If there were no such attaching creditors, perjury might be assigned on that affidavit. Though the proceedings in the two cases are not precisely similar, they are in both equally irregular.

Rule absolute.

MACAULAY, J., JONES, J., and HAGEMAN, J., concurred.

CAMERON *v.* THORNHILL.

Where a party has subscribed for a certain number of shares in a steamer which another person intends to build, if he refuses to accept and pay for the shares, an action can only be maintained on the special agreement, not for the price of the shares in the boat not yet built, as if they are a vendible commodity.

Rule nisi for new trial, on the law and evidence, and for misdirection, or in arrest of judgment; verdict general; first count excepted to; action assumpsit. First count, plaintiff declares, that "defendant is indebted to him in 500*l.*, for divers shares of the stock of a certain steam-boat, barge, or vessel built, or being built, and named, or thereafter named or known

as the Prince Edward, before the time bargained, sold, transferred, and delivered by the said plaintiff to the said defendant at his request."—Verdict for plaintiff 22*l.*

It was projected to build a steamer to navigate the Bay of Quinté, and a subscription was proposed of 4,000*l.*, to be held in shares of 25*l.* each. The defendant subscribed for ten of these shares. It was proved, that the plaintiff, having contracted for the building of a steamer intended to navigate the Bay of Quinté, which steamer was then actually being built by the contractors for him, he proposed to convert the sum which she would probably cost into a joint-stock, and to sell it in shares of 25*l.* each to those who might be willing to engage in the undertaking. A subscription list was accordingly prepared, headed thus:—"Much inconvenience having been felt for the want of a good and suitable boat to ply permanently on the Bay of Quinté, it is proposed, should this scheme meet with encouragement by the merchants and inhabitants of the bay, to build, so as to be adapted for the route, a steam-boat of forty-five horse power, which is now contracted for. The boat to be ready to commence her trips by the opening of the navigation, to be nearly as large as the Henry Gildersleeve, and finished after the same style in the cabin. The cost not to exceed 4,000*l.*, including furniture. The stock to be divided into shares of 25*l.* each, payable as follows, viz.:—ten per cent. on 1st of January, 1842; ten per cent. on 1st of March, 1842; ten per cent. on 1st of May, 1842; and the remainder at six and nine months from 1st May, 1842." Many shares were subscribed for, by persons signing this list, and among others the defendant subscribed for ten shares. In January, 1842, defendant paid the first instalment on his shares, being 25*l.*, and received a scrip certificate signed by plaintiff, declaring "that he was the owner of ten shares of the steam-boat then building on Garden Island, for Mr. A. Cameron" (the plaintiff), and specifying that the amount of shares was 25*l.* each, and the conditions of payment as in the subscription list.

Crawford for plaintiff.

J. H. Cameron for defendant.

ROBINSON, C. J.—It does not appear to me that the objection taken at the trial, that defendant was a partner with plaintiff, as joint owner of the steam-boat, and could not be sued by him for a matter arising out of that transaction, was borne out by the facts in evidence; nor the other objection, that Thirkell and Mason, at all events, were partners with plaintiff, and ought to have joined in suing. The character of the transaction, I think, is inconsistent with either of those inferences, though in the latter point the testimony was rather conflicting. But I have not been able to persuade myself, that this action was either sustained by legal evidence at the trial, or that the declaration in the first count states a good cause of action. The case was one of the first impression, and so struck the learned judge at the trial; and though he ultimately thought the plaintiff had made out a case, and directed a verdict in his favour, yet I think in a novel case of this description the propriety of that direction must be reviewed upon this motion for misdirection, so far at least as regards the substantial points of the case, though not in respect to minor exceptions, merely technical, which were not taken at the trial. Now, upon the best consideration that I can give this case, it does not

appear to me either that the first count states a legal cause of action, or that the evidence proved any : I mean, by evidence, legal evidence. All that there is to charge the defendant, in point of fact, is that he has signed a subscription list, headed with a proposal to build a steamer, but not stating who was to build her, or to whom defendant was to pay his subscription, or whether the defendant's own money, when it should be paid, was not to be applied in building the steamer, of which he was to be part owner. There is nothing shewn that bound this plaintiff to any act which was to constitute the consideration of a promise to him. If when the list was opened it had suited the convenience of this defendant to subscribe for all the shares, amounting to 4000*l.*, and nothing more had been done afterwards by the plaintiff than was shewn to have been done when this alleged contract was made, can it be contended that he could have sued this defendant for the 4000*l.* and recovered it from him ? If he could not, then he can no more sue for the amount of these ten shares. But supposing him to recover in such an action, what would be his ground of action ? What would he have sold to the defendant ? Surely nothing more than the mere expression of an intention to build a steam-boat. I am not determining whether an action might or might not have been brought, charging this defendant upon a special agreement to accept shares in the boat, and upon his subsequent refusal; but that is not the kind of action brought. To support this action, we must go the length of holding, that when a man subscribes to any project, he may be sued by the person who is at the bottom of the scheme for the amount of his shares, as for a commodity sold, in a common count like that for goods sold and delivered. The effect of what has taken place here is nothing more than this : the plaintiff says to defendant, in January, "I am going to build a steam-boat, which will be completed by the 1st of May next, will you take any shares in her ? the defendant says, I will take ten shares." Now it cannot be said that the plaintiff had sold and delivered to defendant ten shares in the boat (supposing her divided into a certain number of shares), because the boat was not in existence ; it might never be finished ; it might have been burnt while on the stocks. A sale of any commodity must include a delivery, actual or constructive, before the vendor is in a condition to sue for the price of the commodity ; but there can be no delivery, actual or constructive, of shares or parts of a vessel which does not exist. If, therefore, plaintiff has sold and delivered anything, it is not shares in a boat, but shares in an undertaking which he may or may not carry through. If the steamer had been completed, and the plaintiff had sold her to a stranger, could he nevertheless have recovered from this subscriber the price of his shares ? if he could, he would then be recovering the value of *stock* in a boat, in which the vendee had nothing but an ideal interest. If such sale could not be made so as to transfer this subscriber's interest, that would shew that the subscribers were joint owners of the vessel. If it could be sold by plaintiff, then it follows that the whole transaction constituted an executory agreement, each party being bound to fulfil his contract, and liable to an action if he failed : the plaintiff if he did not build the boat, and the defendant if he did not accept and pay for his shares when she should be built. When the plaintiff, upon such an agreement, claims a right to sue for stock in his undertaking as for a commodity delivered, he claims to have so many

shares in his promise treated as a vendible commodity. Upon that principle I do not see why a man, when he has begun to plough a twenty acre field, meaning to put in wheat, might not propose to persons to take shares in his next harvest, and sue them for the scrip delivered before the grain is up. The difference here it may be said is, that the object of this undertaking was a steam-boat, which was to be navigated for years, for the joint benefit of the subscribers, and in which therefore they might all have a certain continuing interest entitling them to their shares of the accruing profits ; but there could be no interest in her till she did exist. It was an agreement on the one side to build a steamer by a certain time, and an undertaking on the other, in consideration of that agreement, to accept certain shares in her when she should be built, and to pay for those shares by instalments, some of which were to fall due before the steamer was to be completed. This could surely give no other right of action for the instalments than upon the special contract to pay them ; and in the action upon such an agreement, a question might arise as in *Boydell v. Drummond*, 11 Ell. 142, upon the necessity of a writing under the statute of frauds, the contract not being to be fully performed within the year. On the side of the plaintiff, it is true, if there was any contract it was to be performed within a year ; the boat was to be finished by the following month of May ; but on the other side part of the agreement was not to be performed till after the lapse of more than a year. It would be urged, and perhaps correctly, that this comes within a class of cases which have been considered as excepted from the operation of the fourth section of the statute of frauds ; but it is unnecessary to consider that question, because it seems to me clear that for the reasons I have stated, and which are independent of that statute, this action cannot be sustained (*a*). There should therefore, in my opinion, be a new trial, without costs.

MACAULAY, J., McLEAN, J., and HAGEMAN, J., concurred.

SPALDING v. ROGERS AND OTHERS.

The effect of a new assignment, where but one trespass has been complained of. Plaintiff must not in his replication amplify his cause of action for which he has declared ; nor can he, in his replication, deny the justification wholly, and at the same time reply excess.

Plaintiff sues in trespass quare clausam fregit. In the first count he complains only of one act of trespass, charged to have been committed on 1st June, 1843. In the second count he complains that defendants, on 17th June, 1843, and on divers other days and times between that day and the commencement of the suit, with force and arms broke and entered, &c., laying also an asportavit of goods. Defendants plead the general issue ; and secondly they plead to the first count a special justification that the locus in quo was, and is, public highway ; that plaintiff obstructed it, by placing fences, &c. upon it ; that the justices in special sessions made an order that the path-master should open the said road forthwith. The plea then sets forth the appointment of Rogers to be path-master, and that he and the other defendants, as persons liable to perform

(*a*) *Snider v. Berlin*, reported in 2 M. & W. 652.

statute labor under his orders, entered and removed the said obstructions, which are the same trespasses, &c. To this plea the plaintiff replies de injuriā, and traverses that the locus in quo was a highway. And then he new assigns, stating that he brought his action not only for the trespasses mentioned in this plea, and therein attempted to be justified, but also for that defendants at the said time when in the first count mentioned, on another and different occasion than that in the plea mentioned, and to a greater degree and with more violence than was necessary for removing the said supposed obstructions, committed the *several trespasses in the said plea mentioned*. And also that defendants at the said time when, &c. in the said first count mentioned, broke and entered the said close of plaintiff in that count mentioned, and subverted the soil, &c. as complained of in the said first count, on another and *different occasion*, and for other and different purposes than *in the said plea mentioned*, and *in other and different parts* of the said close *out of* the said way in that plea mentioned; which trespasses are other and different trespasses than those attempted to be justified in the said plea. Defendants demur specially to this replication. To the second count defendants plead also a special plea, justifying the several entries complained of in that count, under a common right of way, and in order to remove obstructions placed by plaintiff in the highway there; and averring that defendants cut down and removed the posts and rails, &c. to a little distance, as was necessary for abating the obstruction to the highway, and to enable them to pass and repass, &c. as they had a right to do. Plaintiff replies to this plea de injuriā, and traverses the fact of the locus in quo being a highway; and he also new assigns for other trespasses than those in this plea mentioned, and for excess, and for trespasses committed extra viam, for which he avers he brought his action in the second count, and which he says were committed on other and different occasions, and for other and different purposes than in the second plea mentioned, and on other parts of the close out of the said way in the said plea mentioned. It was objected that plaintiff is not in a situation to except to the plea to first count (third plea), as he has done, not having given any notice of his exception as required by fourteenth rule (a).

Draper, Q. C., for plaintiff.

Vanhoughnet, for defendants.

ROBINSON, C.J.—As to the replications demurred to, we are of opinion that on the pleadings to the first count, defendants are entitled to judgment. Plaintiff in that count complains of but one trespass, committed on a certain day; defendants justify it under legal authority, to remove obstructions from the high-way. Plaintiff denies the truth of this justification, which of course is a sufficient and complete answer to the defence set up to the single act of trespass he had complained of; but not stopping here, he goes on and states that he brought his action not only for that trespass, which has been attempted to be justified, and of which he still complains, but *also* for another trespass than that mentioned in the plea; which trespass he sets out, and after averring that it was *committed on another and different occasion* than that mentioned in the plea,

(a) That applies only to the party demurring stating his grounds. But see 2 Dowl. 101; 3 Scott, 389; 3 M. & W. 230.

complains that defendants on *that occasion committed* the said several trespasses mentioned in the plea. Now it is perfectly clear that where but one trespass is complained of and is justified, it is not competent to the plaintiff to traverse the justification, and also to new-assign; and for obvious reasons, because if the justification pleaded had reference to another act, and not to the one of which he had complained in his declaration, he should have set defendants right in that respect, by simply replying that the trespass of which he had complained was committed on another occasion and for a different purpose from that mentioned in the plea; he should not have denied the truth of the justification, which it would be idle to do if it were applicable only to another and different occasion, and at the same time that he thus maintains his action against the attempted justification, set up another additional act of trespass as having been committed on another occasion, and for which also he claims damages. This is amplifying his cause of action by introducing a new matter which he had not complained of. And it is repugnant also in the plaintiff to say that the defendants, on another occasion than that mentioned in the plea, and for another purpose, committed, not the trespass complained of in the first count or in the introductory part of the plea, but "*the trespass mentioned in the plea;*" that is tendering a traverse upon the truth of the justification of an act of trespass which he must be taken to have abandoned, when he newly assigns another act of trespass. The replication is indeed altogether repugnant and bad, for while, by new assigning, the plaintiff would seem to abandon the trespass to which defendants have applied their justification, he still adheres to it by traversing their justification, and he tenders an immaterial issue by replying, that they committed their acts set out in their plea on a different occasion and for other purposes than they say they did; which is of no consequence if they relate to a different trespass from that which he had complained of; and then he newly assigns a distinct act of trespass, which has the effect of abandoning this, upon which he has raised these issues, and the effect also of giving himself a new cause of action besides that he had declared upon, for he goes expressly for more than one trespass. With respect to the replication to the second plea to the second count, defendants demur specially. All the same causes of demurrer do not apply here as in the pleading upon the first count. The plaintiff, however, does say that defendants committed the trespasses *in their plea mentioned* on other occasions and for other purposes than those mentioned in their plea, which is bad. But as the second count lays trespasses in diversis vicibus et diebus, it is competent to plaintiff to reply de injuriâ to the justification, as he has done, and at the same time to new assign other acts of trespass, for which, as well as for those attempted to be justified, he may well say he has brought his action; because that is not repugnant to his count, being no amplification of his complaint. From any fault on this account therefore this replication is free. As to the other point, the fault is this: plaintiff says, "I brought my action not only for those trespasses to which you refer in your plea, and which you have falsely pretended were justifiable, but also because, at the times mentioned in *my declaration*, on *other occasions* than those mentioned in the plea, and in a greater degree, and to a greater extent, and with more force than was necessary for removing the obstructions and opening the

highway, you committed the trespasses, not in the count, *but in the plea mentioned.*" It is absurd in the plaintiff to say that he is suing the defendants because, on other occasions *than those mentioned* in their plea, they committed the *trespasses mentioned in their plea*; that is in truth nothing but *de injuriâ*, and the material question is not when or why the defendants committed the trespasses mentioned by *them* in their plea, but when and why they committed the trespasses complained of in the declaration. That is no new assignment of other trespasses than those mentioned in the plea, but it is returning to those trespasses while seeming to abandon them, and denying that defendants committed them for that cause, while plaintiff begins by speaking of those trespasses as *not* mentioned in the plea. Then in this same replication in which plaintiff traverses the justification as to all the trespasses confessed in the plea, he replies also "excess," and "extra viam." As to excess, in answer to such a justification, it seems not to be pleadable, because, a person is not held to use no more force than is necessary in abating a nuisance in a public highway. And to deny the truth of the justification in toto, and at the same time to reply excess, seems double (*a*), where the plaintiff, as here, replies that he is going not for other trespasses than those attempted to be justified by *the plea*, but for the very same trespasses which are mentioned in the plea; and for which, by replying *de injuriâ*, plaintiff has denied that there was any justification at all. As to the extra viam, I see nothing wrong. Plaintiff complains of several trespasses, defendants plead there was a right of way *in, through, and over* the close in which, &c., wherefore they went in and over the highway, as they had a right to do; and that as plaintiff had placed an obstruction in the highway, they entered and abated the nuisance, as they had a right to do. Plaintiff replies, that he sues also for that defendants, on the days mentioned in the declaration, committed trespasses on other parts of the close than those mentioned in the plea, and extra viam, &c.; but the plea states *the close* to be partly the base concession line, and as such a public highway; if so, the defendants could not be *in* the close and out of the highway. As to the third plea, I think we must go into any objections on general demurrer, for defendants have answered them. But plaintiff has put himself on the fact of there being no highway there. And if the close was a highway, defendants could not be trespassers, by entry, whether their proceedings were regular or not. I think defendants should have judgment on demurrer, as to both replications; both being clearly bad in part, and so bad for the whole.

MACAULAY, J., JONES, J., and HAGEMAN, J., concurred.

TEWSLEY v. DUNLOP AND DUNLOP.

The effect of a repugnancy in a replication setting out an award to the submission set out on oyer, as regards the name of the arbitrator.

Plaintiff sues on an arbitration bond. Defendants set out the bond and condition on oyer. The condition is, that defendants will perform the award of "Joseph Kimble" Gooding, sole arbitrator indifferently named,

(a) See 7 B. & C. 346.

&c.; and defendants plead that “*the said arbitrator* mentioned in the condition of the said supposed writing obligatory did not, on or before, &c. make any award,” &c. Plaintiff replies that “*the said Jasper K. Gooding, the arbitrator in the condition of the said writing obligatory mentioned, did, within the time limited, make his award, &c.*” Defendants demur specially, assigning for cause that the plea and condition of the writing obligatory shew that defendants were bound to abide the award of Joseph Kimble Gooding; and that defendants plead that no award was made by the arbitrator therein mentioned; which plea the plaintiff answers by replying an award made by one Jasper K. Gooding, and shewing a breach thereof.

J. H. Cameron, for plaintiff.

Eccles, for defendants.

ROBINSON, C. J.—It is to be considered that this objection is not made after verdict, or upon general demurrer, but the repugnancy is expressly objected to as a defect in form. And further, that this is not a case in which a sufficient allegation having been well made, the party after a scilicet adds something when he need not have added anything, and makes that additional statement repugnant and contradictory to what had been sufficiently stated before. The plaintiff does not reply that the said arbitrator in the condition mentioned, viz. the said, &c., made an award; in which case we might perhaps (though on that point there are opposing authorities) reject the latter statement under the scilicet (even upon special demurrer) and leave the first statement to stand alone. But the plaintiff here replies “That the *said Jasper K. Gooding*, (when there had been no such person named before) “*the arbitrator in the condition mentioned*” (when he was not the arbitrator in the condition mentioned, as the record shews) made the award, &c. The plaintiff ought to have amended, when such a repugnancy was pointed out to him. It was said in argument that the defendants were themselves the occasion of the inconsistency, by setting out the oyer inaccurately, and that the plaintiff's replication is according to the real condition as it ought to have appeared on the record. If that were so, the plaintiff had another course open to him, and need not to have involved himself in this apparent inconsistency, of which we cannot receive an explanation dehors the record. If we suppose that there were in truth a Joseph Kimble Gooding, and a Jasper K. Gooding, and that although the reference was to the former, the latter without authority made an award, how could the defendants resist this in pleading better than by saying, as they have done, that the *arbitrator mentioned in the condition made no award*. Then if the plaintiff meant to rely upon an award made by Jasper K. Gooding as coming under the reference, though another person was named in it, he should have replied that *the person mentioned in the condition* did make an award, and depended on being able to substantiate in evidence that the person making the award was in fact the person to whom the reference was made; and he might perhaps have shewn that he was known by one name as well as the other, and was in fact the same person; but he is altogether wrong in replying that *the said Jasper K. Gooding* made the award, when no such person had been before named; and wrong also, in saying that Jasper K. Gooding was the person *mentioned* in the condition, when the recital shews that he was not. The cases decided on variances occurring

between the evidence given at the trial and the pleadings, are not applicable (*a*). I may consistently sue John *Williams*, as the maker or indorser of a promissory note, and may prove that he made or endorsed the note, though he may by design, or mistake, have signed his name John *Wilson* instead of *Williams*. So I may declare against John *Williams* as having been served with process, if I did serve him, although in fact he may have been erroneously called in the process by the name of *Wilson*. But here there was no act done *by*, or *to* the referee mentioned in the condition of this bond, which can serve, as in those cases, to identify the party; and the first question is, whether a person having signed an arbitration bond referring his disputes with A. B. to the judgment of one person, can be permitted to prove, upon a trial, that he did in fact refer them to another: or, in other words, that another person was meant to be named by him. If there had been two Joseph Goodings, father and son, and the condition had stated Joseph Gooding, senior, to be the arbitrator chosen, it would not have been allowed to this plaintiff to support his action upon an award made by Joseph Gooding, junior, by giving evidence that the son was meant, and not the father, when the writing was express to the contrary. If indeed the fact were in this case that there was but one Gooding in the country, and his name was Jasper, and not Joseph, then a foundation might be laid for shewing that this was the person intended, though he was accidentally misnamed. But in that case the plaintiff should have replied that the person *to whom the said differences were referred*, &c., made his award, and then the pleadings would have been consistent; and the only question would have been on the propriety of receiving parol evidence, to shew that the reference was in fact made to a different person from the one named in the bond. And if to the averment made in that form, he had even added "to wit the said *Jasper K. Gooding*," then we might have held on the authority of several adjudged cases, that the averment without this addition being all that was required, the unnecessary addition of words after a scilicet repugnant to what went before, and in that respect nonsensical, might be rejected as surplusage, even upon a special demurrer. But the plaintiff does not say that the person to whom the differences were referred made an award; but he says that a person, whose name had no where before appeared in the pleadings, made the award, which of course is irrelevant and bad; and how can that be cured by the untrue assertion that such person is the one *mentioned* in the *condition* of the bond, when we can see that he is not *the* person before named? What we may suppose he meant to say is, that he is the person *intended* to be mentioned; but that is not what he does say, and if he had said it without further explanation, he would have been claiming a right as of course to plead that defendants signed a bond stating one thing, while in reality they meant another thing; which it is not competent for him to do. I am therefore of opinion that defendants are entitled to judgment on the demurrer, for this repugnancy in the replication.

MACAULAY, J., and HAGERMAN, J., concurred; JONES, J., dissenting.

(a) See *Willis v. Barrett*, 2 Starkie's N. P. C.

DOE DEM. HARLEY v. McMANUS.

A party against whose lands a writ of *fi. fa.* was issued, under which the lands were seized and sold, cannot contest the validity of the sale on the ground of long delay in selling after the seizure, where it appears that the sale took place at his own instance, or with his assent, and that he has received the benefit of the proceeds of such sale. Neither can his heir, after his death, take an exception to the proceedings.

The facts of the case are stated in the judgment of the court.

J. H. Cameron, for plaintiff.

Sullivan, for defendant.

ROBINSON, C. J.—This is an action of ejectment to recover possession of part of a town lot in the city of Toronto, and the facts come before us upon a special case stated by the parties, under the Statute. It appears in the case that on the 20th July, 1816, these premises, or rather the whole of Lot No. 10 on the north side of Palace-street, of which a part only is now in question, were duly seized and advertised for sale under a writ of *fi. fa.*, in the suit of *Lilly & Boston v. McBeath*, which was returnable in Michaelmas Term, 1817. There is no question that the land was then the property of McBeath, the debtor, and was legally seized under the writ while it was current. Before the return day of the writ, Harley paid upon it, on account of McBeath, a large sum, which still left more than 100*l.* due upon the execution according to the indorsement. In consequence of this large payment, the plaintiff forbore to sell the land on the day appointed, hoping, as we may suppose, that it might become unnecessary. In the mean time, Harley, who had made this payment for McBeath, entered into arrangements with him respecting this property, and various instruments were executed between them, which are stated in the case, but which it is unnecessary to mention. In December, 1821, these premises were sold by the sheriff under the writ and seizure thereon made in 1816, and on 7th of January, 1822, a sheriff's deed was made to McDougall, the highest bidder, and after the sale, Harley relinquished possession of the part sold, and McDougall entered into possession, and afterwards sold to Mr. Dun, who sold to Foster, the landlord of defendant. It appears further in the case that Harley, being a nephew of McBeath's, was fully aware of the judgment against him in favour of Lilly and Boston, and of the execution against his lands; and the different assurances of this and other property made to him, were made upon the condition and understanding that he was to discharge that incumbrance upon the land, besides paying the annuity of 100*l.* to McBeath for his life. With respect to the affidavits of Lawrence and Lindsay, which it is agreed shall be read and considered as parts of the case, I do not understand from that that we are to take the statements contained in them as facts *proved*; if it was intended that we should, that should have been expressly declared, or rather the facts which those persons depose to should have been stated as *facts*; for in a special case laid before us under the Statute, we are not to weigh the veracity of witnesses, we are only to consider facts admitted, not the evidence of facts. They state these facts in addition: that Harley agreed to pay McBeath's debts generally, including the judgment debt, when he took the deeds of the land; that by agreement between Harley and McBeath, the sheriff, in 1821, proceeded to sell a part of the lot 10, in order to pay up the judgment, and that part not

realizing enough to pay off the execution, another portion of lot 10, being the premises now in question, was put up and publicly sold by the sheriff, Harley desiring it, and being present at the sale, and fully assenting by his declarations and conduct, and even assisting the sheriff in the sale. It is further expressly admitted in the case, that after the execution against the lands was paid up from the proceeds of these sales, there remained a surplus in the sheriff's hands of 122*l.* 1*s.* 2*d.*, which, with interest upon it, was accounted for by the deputy sheriff to W. Harley, being paid by direction of Harley to various persons to whom Harley was indebted, except a balance of 67*l.* 19*s.* 10*d.*, for which balance, the deputy sheriff, having (as I suppose) made some irregular use of the money in the mean time, gave a cognovit to Harley, on which judgment was entered. The delay in acting upon the *fi. fa.* from July, 1816, to December, 1821, is accounted for partly by the fact of the greater part having been paid by Harley in 1817, and by the reliance placed on his agreement to discharge the rest; but chiefly, as it seems, by the circumstance that there was a dispute between Lilly and Boston, and McBeath, in relation to a credit which the latter claimed of about 60*l.* to be deducted from the judgment, and which the others maintained had been already allowed to him. This dispute was at length referred to an arbitrator, and was only decided by him in November, 1821, against McBeath, and then the *fi. fa.* was acted upon, and the sale made in December, 1821, for paying off the then admitted balance. It is not necessary, in this case, to determine the question whether when a sheriff has seized and advertised lands under an execution he can take up the execution at any distance of time afterwards, and proceed to sell the lands, whether the debtor is willing or not: and whether the delay is accounted for or not by negotiations between the parties, and instructions to the sheriff, and by a continuance of regular postponements; for that is not this case. If it were, I should feel the question to be a somewhat difficult one, and one of great importance in this country, where many real estates have been sold under executions; and as I apprehend, often after great delays, which, at a distance of time it would not be found easy and perhaps not possible to account for. The interests to be protected are those of the former owner of the land sold on the one hand, who may insist upon not being prejudiced by any illegal act of the sheriff, and those of the purchaser at sheriff's sale on the other hand, who buys, as we may suppose, under the reliance that what is transacted openly by a public officer, under the king's writ, is done rightly; and who, it should always be borne in mind, may seldom have it in his power, especially after a lapse of years, to shew the reasons and facts upon which the sheriff or the parties acted in a proceeding to which he was a stranger, except as he became a purchaser at the public sale. Some of these cases may present difficulty in determining between the conflicting interests of the purchaser, and the debtor; but most of them I think will be found to be governed by a well known principle of law which is quite just in its operation. There may be now and then a case when the apparent want of regularity in acting on the *fi. fa.* has arisen from the mere negligent dilatory conduct of the sheriff, where he has neither been instructed nor sanctioned by the parties in taking any unusual course: but generally, delays and postponements of sales take place at the instance of the debtor, and on concessions made by the

plaintiff and the sheriff for his interest or convenience. In these cases the maxim "*volenti not fit injuria*" applies. It is in the power, and at the option of every one, to waive the benefit of a principle which exists for his own protection; and when an act has been done at his request, or with his deliberate assent, from which he has derived a benefit, he cannot be suffered afterwards to impeach its validity. In many cases the acquiescence of the parties will supply the only evidence that can be given of this consent, which will in those cases be constructive. In other cases, the purchaser at sheriff's sale may be so fortunate as to be able to prove that whatever was done, that might seem irregular, was done with the express assent of the debtor, or even at his instance. This seems to be clearly a case of the latter kind. There can be no doubt that after the sheriff has seized and advertised lands for sale, he may defer the sale from time to time with the assent of parties, and may ultimately sell, long after the return of the writ, without any new execution coming to him. We cannot say, upon any authority, that the sale might not be postponed from time to time, and the completion of the execution suspended as long as was done in this case, or much longer, if the only parties interested chose to have it so. Where the sale is thus postponed, I assume it to be proper and necessary to the regularity of the proceeding, that the notice of the intended sale should be continued from time to time, so that it may not seem that the writ has been abandoned, or rather the seizure under it. When there has been an acquiescence in the possession of the purchaser for many years, considering the difficulty there may be after such a time to produce proof of advertisements being continued and sales postponed, which are mere arrangements in the sheriff's office, of which no record may have been carefully preserved, it is but just, as well as in accordance with the maxim "*omnia presumuntur rité esse acta*," to assume that the writ was duly kept in force, unless it be proved that in fact it was not. And when it is shewn that there really was a want of some formality of advertising or adjourning sales, but that nevertheless the sale which did take place was at the time, and has been for a long period afterwards acquiesced in by the party interested in disputing its validity, we are in my opinion to assume that there was an express, or at least a clearly understood waiver, by such party, of any such omitted formality. It is laid down broadly as a principle in *Rex v. Stacey*, 1 T. R. 4, "that where a person assents to an act, and derives and enjoys a title under it, it shall not lie in his mouth to impeach it." And many cases shew that where a person, instead of "*enjoying a title*," as happened to be the expression here used by the court, derives an advantage or convenience to himself by an act which he has assented to, he is in like manner precluded from impeaching it. In Starkie's treatise on evidence (*a*), the principle is thus stated: "There is a strong line of distinction between admissions or conduct upon which a party has induced others to act, or by means of which he has acquired some advantage to himself,—and those admissions which have been made without any reference to the matter litigated, and which are not immediately connected with it. In the former case, the party is usually concluded absolutely by such an admission." Now in this case, there is not the slightest doubt that the sale by the sheriff in December, 1821, under which this defendant claims, was made

not merely with the assent of the debtor, McBeath, but with the knowledge and assent of Harley, the father of the lessor of the plaintiff; that both he and McBeath deliberately desired to have the judgment discharged by the sale of this land in execution, for the advantage and convenience of both of them. No other person was interested in the sale, except the plaintiff in the execution, who had nothing to say after he had been paid his debt; and who through his attorney took the measures that were taken at the instance of Harley and McBeath. Under such circumstances, it is not only equitable, but legal, to look upon the transfer which was made to the person who by *their* conduct was led to become the purchaser, in the same light as if it were an assurance made directly from them to him, instead of being made through the medium of the sheriff. McBeath got his debt paid by it; he never called in question the regularity of what had been done; and could not have done so after appropriating to the payment of his debt part of the proceeds of the sale. Harley, by receiving the surplus money produced by the sale, equally ratified the act, if any such ratification were material, when he had given his express assent at the time the act was done. Where a person had for a length of time acquiesced in a commission of bankruptcy which had been sued out against him, and taken steps which implied an assent to its validity, it has been held that he could not be permitted to contest its validity (*a*). It would be monstrous if, after procuring this part of the estate to be sold in order to relieve the remainder, and after applying to other uses the remainder of the purchase money, Harley could be allowed, notwithstanding, to contest the validity of the sale, upon some alleged irregularity (which by the open public conduct of himself and of McBeath must have appeared to all the world to have been waived,) and upon the strength of this irregularity, endeavour to regain possession of the estate; and this too after a lapse of nearly twenty years, in which time the estate has gone into the hands of successive purchasers, who have advanced their money upon it in the confidence that all was right. Harley went out of possession when the land was sold, as he naturally would have done; and though he lived several years, we hear of no act or declaration on his part, or on McBeath's, impeaching the sale. Of course the heir of Harley can have no right, as such, to this property better than his father had. In the case cited of *Pickard v. Sears* (*b*), the language of Lord Denman comes fully up to the facts of this case. "The rule of law is clear, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." There goods had been sold in execution to the defendant, the plaintiff being present, and authorising the sale so far that he consulted with the execution creditor to the disposal of the property, without mentioning his own claim, after he knew of the seizure and intention to sell. And the court say: "we think, after his conduct in standing by and giving a kind of sanction to the proceedings under the execution, that the opinions of the jury ought to have been taken whether he had not, in point of fact, ceased to be the owner." In the case before

(*a*) 6 Esp. N. P. C. 20; 2 Vezey, 236.

(*b*) 6 Ad. & Ell. 474.

us, there is no doubt upon the substantial question of the land being liable to the execution, for it was clearly bound by it before any conveyance was made by McBeath to Harley. The question is wholly upon the regularity of proceeding in acting under that writ ; all that was done, being done with the perfect assent of both McBeath and Harley, and at their express desire, and they alone being the persons who could be affected by the irregularity, if there was any. In the case of the Queen *v.* the Committee for the South Holland Drainage (*a*), the court rested their judgment wholly on the principle, that a party cannot take advantage of defects which he has himself occasioned, or expressly or impliedly waived. Having while at the bar had an intimate knowledge of these transactions, while they were going on ; and constant communications respecting them both with Harley and McBeath, I would more willingly have forborne to express any opinion upon them ; but as the parties have declared their wish to waive any exception of that nature, and as my own recollection of facts only confirms what both parties have admitted in the case stated, I concur with my brothers in the judgment, that the verdict should be entered for the defendant.

McGILLIS *v.* McMARTIN, SHERIFF, &c.

Where the Sheriff had seized goods under a *fi. fa.*, and allowed them to remain on the defendant's premises, on the understanding that they should be sold there on a future day, if the money were not sooner paid, the license thus given to enter on the premises and sell the goods accordingly, can not be revoked by the defendant.

Plaintiff declares in trespass *quare clausam fregit*, &c., laying the trespasses on 21st February, 1842, and on divers other days and times, &c., in two counts : the first for breaking the close, subverting the soil, &c., and the second for breaking and entering the dwelling house : with a third count for taking plaintiff's goods on the said 21st February, and converting them to plaintiff's use. Defendant, as to trespasses in first and third counts, justifies under a writ of *fieri facias*, in Sheldon *v.* this plaintiff, returnable first day of Easter Term, &c., and delivered to defendant on 4th November, 1841, under which he entered to levy, and committed the trespasses in those counts mentioned. To the same counts he also pleaded justification under a writ of *venditioni exponas*, returnable first of Trinity Term, in the same suit, delivered to defendant 24th March, 1841, with *fi. fa.* for residue, under which writ he entered and seized the goods, &c. To the second count defendant pleads a justification under the second writ, as in the last plea. And in a fifth plea he pleads that he committed all the trespasses by the leave and license of plaintiff. Plaintiff replies to the three pleas justifying under the writs, that the *trespasses* in the first and third counts mentioned were committed *at another time and on another occasion* than by virtue of the said writs. (The third count complains of but one trespass.) To the plea of license he replies *de injuriâ*. The defendant pleads to the trespass newly assigned, the general issue and the license of plaintiff. To which plea of

(*a*) 8 Ad. & Ell. 437-8.

license plaintiff replies *de injuriâ*. The jury found for defendant under the direction of the learned judge. Motion for new trial for misdirection, and on the law and evidence.

Blake, counsel for plaintiff.

Cameron, for defendant.

ROBINSON, C. J.—On the part of the defendant it is contended, that the sale by the sheriff changed the possession, and that plaintiff cannot therefore bring trespass quoad the goods; secondly, that nothing was done which the plaintiff had *not* given to the sheriff (the defendant) his license or permission to do; thirdly, that the license so given was not revocable, and if it were, had not been revoked. It is reported in the notes of the trial, that the plaintiff opened his case only upon the ground of the injury done him by wrongfully taking his goods, not complaining of any illegal entry into his close. With regard to the alleged trespass to his goods, the deputy sheriff having seized them before the 21st February, 1842, on that day sold them, under the *fi. fa.* set out in the pleas. If that sale was legal, no subsequent intermeddling with them by the defendant, or by his authority, can make defendant liable to the plaintiff in trespass. And it is besides to be observed, that the trespass to plaintiff's goods is charged only in the third count, and laid only to have been committed on one day, namely, the 21st February, 1842. Then as to that trespass to the goods: plaintiff in his replication to the justification pleaded under the writs denies that it was committed under that writ, and new assigns; but the evidence certainly shews that there was no taking of the goods on the 21st February, except the sale of them under the *fi. fa.* which took place on that day. And I see nothing on the evidence which could warrant us in saying that there was a trespass committed in selling his goods then. The goods had been seized under the first *fi. fa.*, in November, and allowed to remain in plaintiff's possession till the sale, at the request of the plaintiff himself and for his accommodation, and after several delays and postponements to suit the convenience of the plaintiff, the sale at last took place on the 21st February, according to notice and regular postponement. I see nothing done but what was proved by several witnesses to have been previously agreed to by the plaintiff. And after the sale, he is sworn to have admitted that he was indulgently treated by the defendant, and nothing done but what defendant had a right and was bound to do. Yet notwithstanding this, and though the defendant took much trouble at his request, and for his accommodation, after the sale, in the hope that he would be able, as he said he should, to redeem his property, he seems to have conducted himself vexatiously at last; and under the idea, as it would appear, that the sheriff had in some way committed himself, he brings this action, but for what wrong or injury I certainly cannot discover on the evidence. He was treated with lenity throughout; his own propositions were, as far as possible, acceded to, and nothing illegal done, either in entering into the close, or converting the property, nor any thing done which it was not fully understood between the sheriff and him was to be done. It certainly would be to be regretted if, under such circumstances, there had been any mere inadvertent irregularity committed on the part of the sheriff, which would expose him to a recovery in this action; but I see none. The first seizure vested the property of the goods in the sheriff;

the sale of them on the 21st February is what the plaintiff sought to recover for,—that was by the plaintiff's consent beforehand, and acquiesced in afterwards, and was not in itself any injury to the plaintiff. We must consider that this is an action against an officer of justice, for an alleged trespass committed by him in acting upon a writ. As the jury have found a verdict for the defendant, we have no ground for assuming that they discredited the evidence given on his behalf, and indeed they could not properly have discredited it, because it was neither impeached, nor contradicted. Then looking at the account of the whole matter given by the witnesses, I cannot imagine what reasonable ground of complaint the plaintiff can have supposed he had against the sheriff, or on what pretence he could have felt himself justified in harassing him with an action. It is not denied that the sheriff had an execution which he was bound to levy upon the plaintiff's goods, and on which he might, and in strictness ought to have sold his goods before the beginning of February, when the writ was returnable. In the execution of his duty the sheriff, or which is the same thing, his deputy, went to the plaintiff's house and farm, and seized his cattle and other goods, as he was bound to do. That vested a special property and the right of possession of those goods in the sheriff. If the sheriff had been rigid, he should have driven away the cattle and removed the goods, at the time of the seizure, and at the expiration of the eight days, sold them under the writ; and however harsh the plaintiff might have thought such a proceeding to be, he would have had no pretence for troubling the sheriff with an action. But, unfortunately and imprudently for himself, the sheriff was willing, it appears, to afford every possible chance to the plaintiff to save his property, from the month of November when he made the seizure, &c., and indulgently postponed the sale at his request from time to time till after the writ was returnable; until at last it was finally understood and agreed between him and McGillis, that if the latter could not find money to satisfy the execution by the 21st February, the goods were to be sold on that day, upon McGillis's premises, where every thing had in the mean time been allowed to remain for his own accommodation. And there can be no doubt it was a great accommodation to him, for he had in the mean time the use of the horses and cows, and articles of furniture as before; whereas if they had been taken off the premises, of course the sheriff could not have delayed the sale of them, as he did for many weeks, to suit the debtor's convenience, without making it an express condition that the latter should bear the expense of keeping the cattle and goods in the mean time; and this expense would have consumed no small portion of their value. The sheriff has met, in this instance, with the reward which often follows such good-natured indulgence; and a few such actions as the present would go far to convince him and other sheriffs that their only safe course is to proceed punctually in the straight and strict line of their duty, and not allow themselves to be persuaded by debtors into acts of indulgence which have too often no other effect than to expose themselves to troublesome and expensive lawsuits. No doubt, when a sheriff has seized goods under a writ, his duty is to remove them instantly,—he has no right to leave them incumbering the debtor's premises between the seizure and the sale, and no right, strictly speaking, to enter afterwards on the premises, in order to make a public sale of them there. But there

is also no doubt that, in by far the greater number of cases, the officer, instead of thus removing the goods and taking them at once out of the possession of the debtor, does allow them to continue in his possession, in the hope that a sale may become unnecessary, and from a willingness to meet the wishes and convenience of the debtor, and possibly also for the reason, which is of as much consequence to the debtor as to any one else, that some of the goods are more likely to sell to advantage on the premises, than away from them. It is hardly necessary to say, however, that the sheriff could never venture to pursue this course, which, for the convenience of parties, has become the usual course in this country, if he had reason to apprehend that the debtor would be so ungrateful as to complain afterwards of that as an injury which had been done at his own request, and to suit his interest and convenience, and if he could suppose that the law would bear out the debtor in so unjust a proceeding. In the case before us, after repeated postponements, it was finally agreed between the sheriff and this plaintiff, that if the debt were not paid, the cattle and goods were to be sold upon the premises at a certain hour on the 21st February; and McGillis had engaged that they should then be forthcoming there. On that day the deputy sheriff goes out to keep the appointment, and to his surprise meets McGillis coming into town with his horses, which were part of the stock to be sold that day under the execution, according to the advertisements which had been published, and according to the express understanding with McGillis, who was thus, contrary to his agreement, taking them away in another direction. Besides others who were accompanying the officer, the plaintiff in the suit was also going out, to prevent, as we may suppose, the property from being thrown away for want of bidders. These horses were, as it appears, a valuable portion of the property, and it was not surprising that the officer remonstrated with the debtor as he did, and endeavoured to prevail upon him to go back with him and restore the horses. He would do neither, but under the pretence of going to Cornwall to get money, would persist in his journey: of course it was his duty to have ascertained before the last moment whether he could obtain money or not, to prevent the sale of his goods. The officer had no alternative but to insist on his giving up the horses, or going through the delay and expense of a further postponement and advertisements, which would seem certainly to be trifling with the plaintiff in the *fi. fa.*, and affording him very fair ground of complaint. He did persist, and take away the horses, and proceeded to McGillis's house and farm, and went on with the sale according to the public notice which had been given, and as it had been well understood and agreed by McGillis he should do. Now if in taking away the horses from McGillis in the highway, in the manner described by the witnesses, the deputy sheriff committed any assault upon him, so as to render himself liable to an action for trespass against his person, of course no express or implied license to take the goods would have justified that. But there is no question before us on this point, for the plaintiff has complained of no such injury. He has sued for wrongfully entering his close at divers times, for wrongfully entering his house at divers times, and for wrongfully taking his goods *on one occasion*, viz., on the 21st February. Then first, with respect to any trespass in entering his house or close, there was nothing shewn to be done that does not usually take place in this

country on selling after seizure on a fieri facias, and nothing that McGillis had not expressly assented to. The evidence abundantly proved a leave and license from McGillis, if that were necessary, to enter upon his premises on the 21st February, and sell the goods if the money were not then paid. If this license were revocable, which I am of opinion it was not, after the debtor had received the benefit and convenience of delay on the strength of the arrangement; yet I see nothing to shew a revocation. There was no proof of any prohibition, on the part of McGillis, to go on with the sale. He shewed certainly a wish to get away with the horses, contrary to his agreement, but when these were taken from him he seems to have made no opposition to any thing that was done afterwards. And after the sale, while he was soliciting further indulgence as to redeeming his property, he does not seem to have complained that the sheriff had acted illegally in going upon his premises,—on the contrary, it was expressly sworn that he acknowledged the sheriff had done only what it was his duty to do,—and he claimed no damages at the trial, as it appears, on any other ground than on account of the taking of his goods. Then as to the selling his goods, I see no just pretence for this action in any thing that has taken place. The goods had been seized in November while the writ was current, and after several delays, granted for the accommodation of McGillis, and upon his failure to pay the money upon the day agreed upon, they were sold. But one trespass in regard to the goods is complained of; the plaintiff commenced his case by shewing the taking of his horses on the highway, while he was on the road to Cornwall; to that trespass, therefore, which was a distinct act, he was in strictness confined upon the third count, on which alone he could recover for that description of injury. But supposing that he could be permitted to follow up the charge by giving evidence of the conversion of the horses by sale seven hours afterwards, and could add to his claim on account of the horses, a claim also to recover for the cattle and goods sold at McGillis's on the same day, what wrong was committed in taking any of them? By the previous seizures the sheriff had a special property in them, and the right to resume possession and sell them, as he did. He had a legal right to do this, whether McGillis had been willing or not: and besides, the plaintiff had expressly agreed that the things should be sold on that day, as they were. And if by any slip made by the sheriff's officer, there had been room given to treat the sale as irregular, yet it would be contrary to sound legal principles to allow the party to bring an action for any mere irregularity, where there had been no injury suffered, when we find that after the sale was over he put the sheriff to the trouble of further exertions and expense to suit his convenience, and upon the footing of further indulgence, and to give him an opportunity, after all that occurred, of redeeming his goods, if he could. If McGillis meant to treat the sheriff as a trespasser, in selling his goods on the 21st February, he should have been consistent, and told him so, and should have repudiated the sale. But instead of this he puts him to unreasonable trouble, by soliciting his indulgence and his good offices with the purchaser at the sale; and then, finding he cannot make up the money, he turns round upon him, and treats him as a trespasser. The trouble which the sheriff took at his instance, in persuading the purchaser to give up the goods bought at the sale, and driving the cattle some miles to the

neighbourhood of McGillis's residence, in the hope that he could procure money, and by paying the debt save his property—all this trouble proved fruitless, and seems only to have imposed upon the sheriff the necessity of selling the goods again under a venditioni exponas afterwards taken out. Whether this was because the purchaser at the sale on the 21st February would not take the goods back again, after he had good-naturedly allowed the sheriff to take them back at McGillis's request, or for what other reason, does not appear. But though all that was done arose merely from efforts to serve the plaintiff, he has sought to derive from this second sale an argument that the sheriff must, by his own admission, have been a trespasser in the former sale, and in his subsequent interference with the goods at the plaintiff's request. The sheriff, it appears, in order to enable the plaintiff's attorney to take out a venditioni exponas, to sell the goods, when it became certain that McGillis either could not or would not redeem them, made a return in the f. fa. on which he had seized in November, that the goods remained in his hands unsold for want of buyers. And so they did literally, though only in this sense, that upon the proposition of the sheriff made at McGillis's request, the purchaser, Sheldon, had liberally agreed to relinquish the goods, and had given them up to the sheriff, on the assurance of McGillis that in a few days he would pay the money; so that the sale fell through in consequence, though it was a perfectly legal sale. It would be strange, certainly, if McGillis could claim, from his own failure to perform his undertaking, the power of converting that into a trespass, which was a regular and legal act when it was done. And, besides, upon the whole case, the plaintiff complains of but one trespass in taking his goods; and the defendant justifies that trespass under the f. fa. and venditioni exponas which he sets out. The plaintiff replies by new-assigning a trespass on another occasion than under those writs, and yet he gives evidence of the very act which clearly was done under the f. fa.; and having done that, and being unable to go into proof of a second trespass, when he had complained of but one, it was impossible that he could recover. The jury have found rightly, in my opinion, for the defendant. A good deal of stress was laid in the argument upon a supposed revocation of the license pleaded; relying upon what took place in the highway as a revocation such as would place the sheriff in the situation of a trespasser if he nevertheless went on and sold the goods in accordance with the previous understanding, when he agreed at the request of this plaintiff to postpone the sale. But a license given upon an undertaking of this kind was, in my opinion, incorrectly assumed to be revocable. The case of *Wood v. Hearnley* (*a*), is a strong case of this kind, and the court there held this language: "A man who by consenting to certain terms induces another to do an act, shall not afterwards withdraw from those terms." When the sheriff first proposed to sell, he might without question have sold the goods under the f. fa.; the defendant, not opposing his right to sell, asked for delay, and obtained it from time to time until the 21st February, when he expressly agreed that the goods should be sold on his premises, if he did not before that time pay the debt. It was not a mere gratuitous permission to commit a trespass upon him, that he was giving; he obtained

very great indulgence, by undertaking that the goods should be forthcoming to be sold on that day, if he did not redeem them ; and he cannot be permitted to turn round upon the sheriff, and treat him as a trespasser, on the ground that he finds it convenient to fly from the terms on which he obtained the favour.

JONES, J., McLEAN, J., and HAGEMAN, J., concurred.

Rule discharged.

DOE DEM. G. W. DUNN v. McLEAN.

A person disseised of land by another, who is in possession, claiming the estate in opposition to him, cannot, while he is so dispossessed, transfer the estate by grant, or by bargain and sale.

EJECTMENT FOR WEST ONE-THIRD OF LOT 22 IN THE FIRST CONCESSION OF LANCASTER.—John Dunn, on 12th April, 1823, conveyed to James Williams, for 100*l*; registered, 15th April, 1823. On the 13th August, 1842, Williams conveyed to lessor of plaintiff, for 100*l*, by deed, not registered. The defendant claims under a sheriff's deed, made 26th June, 1830, on a sale made on a *fi. fa.* against lands, from the Eastern District Court, in a suit of Donald Cameron against John Dunn, returnable 1st April, 1830. This action against Dunn was commenced in 1823, and verdict obtained at the April sittings of that year. Notwithstanding the conveyance made to Williams in 1823, John Dunn continued in possession of the premises from that time till 1835, when, upon an ejectment brought against him by this defendant, as assignee of the sheriff under the deed of 1830, and judgment by default against the casual ejector, J. Dunn was dispossessed, under a writ of hab. fac., and one Edgar put in by defendant, afterwards, as his tenant. And while Edgar thus possessed the premises as tenant of this defendant, and, of course, adversely to John Dunn and Williams, the deed was made from Williams to the lessor of plaintiff, who is son of John Dunn,—Williams being his brother-in-law.

Vankoughnet, counsel for plaintiff.

Cameron, counsel for defendant.

ROBINSON, C. J.—Upon the evidence given at the trial of this cause, there appears the strongest reason to look upon the deed from John Dunn to Williams, made in 1823, as fraudulent; a voluntary deed made to defeat creditors. It was made by one relation to another—no consideration satisfactorily shewn, as on a purchase—made pending a suit against Dunn; and the grantor remained for years in possession. Then, when an ejectment was brought some years after by the purchaser at sheriff's sale, such purchaser was allowed to recover and gain possession; and afterwards, Williams, never having taken possession, but having allowed this defendant's tenant to continue in for many years, while he is so in possession, he makes a deed to the son of J. Dunn. It was proved, further, that in 1830, John Dunn voted upon this land at an election, as if it was still his own. The jury nevertheless seem not to have found against the deed as fraudulent, which appears surprising considering the circumstances under which the deed was given, and the facts which were proved to have followed the conveyance. But apart from the question as to the honesty of this alleged transfer, the defendant, at the trial, took another

obvious exception to the plaintiff's recovery : he contended that Williams being out of possession at the time he pretended to convey by bargain and sale to George Dunn, and another person being in possession claiming the fee, no estate could pass by the deed. This was urged as ground of non-suit, and leave was reserved to enter a non-suit upon this exception, if the court in banc should be of that opinion. I am clear that the objection is entitled to prevail; there is no authority of any adjudged case, that I am aware of, either in England or in this country, upon which we could hold that a deed of bargain and sale, made under such circumstances, could pass the estate. The first we hear of this estate is, that John Dunn, the father of the lessor of the plaintiff, was living upon it as the owner, in 1823. He must be taken to have been seised in fee, as nothing to the contrary is shewn ; and as this plaintiff moreover claims under the conveyance made by him in fee, on the 12th April, 1823, to Williams, he is not in a situation to dispute that fact. The sheriff having a writ against the lands of John Dunn, and seeing him in possession, either not being aware that he had made this deed to Williams, or concluding from what he saw and heard, that it must be fraudulent, took upon himself to sell the land under this writ, in 1830, as if John Dunn were still seised in fee ; and he sold it to this defendant, as the highest bidder. The debtor, J. Dunn, not being inclined to give up the possession, as it seems, the defendant resorted to his action of ejectment ; no defence was made, and he was put in possession by the sheriff under an habere facias, and his tenant from that time has lived in actual possession of the estate. It was after the defendant had been many years in possession through his tenant, and while he was so in possession, claiming the fee, that Williams, who had taken the deed from John Dunn, his brother-in-law, in 1823, but who had never gone into possession under it, made the conveyance by bargain and sale on 13th August, 1842, to the lessor of the plaintiff, the son of John Dunn. I take it that by the law, as it has always been administered both in England and here, a deed of bargain and sale given under such circumstances can have no operation. The plaintiff argues that the possession of the purchaser at sheriff's sale, was no disseisin ; and that as Williams cannot be said to have been disseised, that is *disseized* in the legal sense of the term, he must therefore be in a condition to convey. No doubt it is said, in many books of authority, that disseisin is the wrongful dispossessing of him who has the right ; and that "it ever supposes a wrong." The case of *Taylor ex. dem. Atkins v. Horde* (a) was referred to, which proceeded upon the principle so fully and ably explained in it, that a person entering under judgment and process of the court, cannot be said to have entered wrongfully, and that such entering cannot therefore be termed a disseisin. "A judgment in ejectment," his lordship says, "is a recovery of the possession merely, without prejudice to the right, and he who enters under it can only in truth and substance be possessed according to right. If he has a freehold, he is in as freeholder ; if he has a chattel interest, he is in as a termor ; if he has no title, he is in as a trespasser, and is liable to account for the profits." In that case, as his lordship remarks, "it was found by the special verdict that the ejectment was brought by Sir Robert

Atkyns, to recover the possession, *but it was not found that he claimed the freehold.*" In this distinction consists the difference between the case of Taylor and Horde, and the present. The defendant here, as the evidence plainly shews, was in, claiming the whole estate in the premises—he had purchased all the estate that John Dunn had—and recovered it, and held it adversely to the person who claimed to hold the fee under a previous conveyance from him. The plaintiff's argument supposes the principle of law to be only that a person who has been *disseised*, cannot convey by bargain and sale; but it is more comprehensive than that: it is, that a person who is *not seised*, cannot so convey; in other words, he cannot transfer what he has not got. It is said in Sheppard's Touchstone, "regularly, a man cannot grant or *charge that which is not in his own possession*; albeit he have a right to do it; and therefore, if a man be disseised of his land and before he hath entered into or recovered the land, he doth grant the land or his right to the land to a stranger, in these cases the grants are not good." Now that is putting a case which is strongest in favor of the grant, to say that even a man who has been disseised, that is, wrongfully put out of his rightful estate, cannot, while he is out of possession, convey it. And this being the case, it would be strange, indeed, to contend that where a man bona fide claiming the right to the estate, enters into the land and possesses it, without violence or wrong, such notorious adverse possession shall not disable any other person who is out of possession from transferring by deed the seisin of the land. The same authority, Shepherd's Touchstone, (244) says: "If a lease for years be made to me, I may grant away my estate before entry, for I have an interesse termini. And if the lease be to begin at a day to come, I may assign over my interest before the day come, for the interest is in me from the time of making the lease." This it is clear is said without reference to the case of another person being in possession at the time holding adversely; for on the same passage the learned editor of the last edition of this work, Mr. Preston, remarks "but if the termor be *dispossessed*, he cannot assign the land till he has re-entered, or revived his estate." Mr. Preston does not say merely if the termor be *disseised*, but if he be *dispossessed*. And it would be manifestly absurd to say, that a person disseised, or wrongfully held out of an estate by a mere trespasser, who claims nothing, retains less power of disposition over it, than one rightfully held out by a person claiming to be and acting as the real owner. The same author says (page 244): "I may give or sell my goods that I have not in possession, and therefore, if a man take my goods out of my possession, I may afterwards give a grant of these goods to *him*, or to another man, and this grant or gift is good." Upon which passage Mr. Preston remarks: "of this proposition doubt may be entertained, for a gift of the goods, if it might be made, would in reality be a gift of the right of action to recover them, and the law will not allow the action to be transferred. As to the person taking the goods, the proposition is sound law, for a gift to him amounts to a release," &c. It would be tedious to cite Coke and Plowden, and to go through the usual round of authorities for this very ancient doctrine of our law. I take no point to be clearer than that upon the principles of the common law, and even independently of the reasons drawn from the Statutes of Maintenance (a)

(a) 32 Hen. VIII. ch. 9, and the earlier Statutes.

a person disseised of land by another who is in possession claiming the estate in opposition to him, cannot, while he is so dispossessed, transfer the estate by grant or by bargain and sale. If all that we knew of this case was, that before the deed was made by Williams, the defendant had recovered possession under an ejectment, and had continued in possession, claiming for all that appeared nothing more than a right of possession for the term stated in the demise, then the arguments drawn from the case of Taylor and Horde would apply. But this case is widely different. If, upon the sheriff's sale being made to the defendant, John Dunn had relinquished the possession and allowed the defendant to enter and enjoy the estate, that would clearly have been no wrongful entry by the defendant; and he would have been under no necessity for entering through means of an ejectment,—but would it therefore have followed, that because he had not unnecessarily taken Dunn by the shoulder and disseised him, Dunn would, on that account, have the power of making a valid deed of bargain and sale of this estate, and transfer what he had not himself, an estate in possession, notwithstanding the defendant was all the time in open visible enjoyment of the land, receiving to his own use the rents and profits, and claiming to be the owner of the fee? It is clear he could not. Then he can be in no worse situation, having entered under a judgment in ejectment claiming the fee, than if he had entered peaceably without the necessity of an action. Williams could not be actually disseised in the strictest sense of the term, because he had never entered under his deed, and therefore never could be actually put out. If no one was on the land, his title, supposing it to be good, would draw after it the constructive possession, and he would be deemed to be seised of the estate in possession; but there can be no constructive possession against an actual adverse possession. In all such cases the person held out of the estate by another, is disabled from conveying till he has reduced his right to possession—he must fight the battle himself, and not sell his right to a lawsuit to another. There are many sound considerations of public policy which support this reasonable principle, and it has been always consistently maintained, in modern as well as in earlier times, and wherever the English common law prevails. Upon this ground I am of opinion judgment of non-suit should be entered.

JONES, J., McLEAN, J., and HAGERMAN, J., concurred.

POWELL *v.* WILLIAMSON.

QUÆRE.—Would a complaint against A. B. that he “was seen in the act of destroying or injuring private property,” without alleging that the property belonged to *another* person, or that the act was wilfully or maliciously done, authorise a warrant as for a malicious injury to property under 4 & 5 Vic. ch. 26? Where a magistrate allows a prisoner to depart, without examining into the charges against him, with a direction to appear the next morning at the Police Office, and in the mean time, on the ground that he was assaulted by the prisoner when in custody before him, gives a verbal order to a constable to apprehend him and take him to the station-house or gaol, such imprisonment is illegal, and the magistrate cannot justify the arrest.

Non-suit moved on leave reserved at the trial, on the law and evidence, and for misdirection, or for excessive damages. Plaintiff declares in

trespass, for assault and false imprisonment, in two counts, both laying the assault on the 8th March, 1843. General issue pleaded. Verdict for plaintiff, 37*l.* 10*s.* 0*d.*

Kirkpatrick, for plaintiff.

Cameron, for defendant.

ROBINSON, C. J.—An objection was taken, at the trial, to the notice of action, (defendant being entitled to notice as a magistrate), that it did not sufficiently describe the place of residence of the attorney to whom it was directed; but the direction seems particular enough: “John Breakenridge, of the town of Kingston, office opposite the English Church, King Street, in the said town of Kingston, attorney for the within named Grant Powell;” and in the argument that exception seemed to be abandoned. On the 8th March, 1843, J. Daley made information on oath before defendant, as a justice of the peace, that about 2 o’clock A. M. of that day, he was awakened by a noise in the street, and looking out, saw plaintiff and others pulling at the water conductor of an adjoining house, that he called to them, and received an abusive answer; immediately after he heard a pane of glass broken by some of the party. On the same day defendant, on this information, issued a warrant to apprehend Powell, and another whom the informant identified, and bring them before him to answer a complaint made before him on oath, that they had been seen by J. Daley “in the act of destroying or injuring private property.” If this case had turned wholly upon the sufficiency of the complaint in point of legal form, I think the question would not have been clearly with the defendant on the authorities, for the language of it is extremely vague and general. It is for “being seen in the act of destroying or injuring private property.” It is not even stated that the property belonged to another person; for all that the warrant contains it might have been his own; neither is the injury alleged to have been done wilfully or maliciously, which alone would make it a criminal offence under the statute 4 & 5 Vic. ch. 26, upon which no doubt the justice intended to proceed. A fireman is injuring or destroying private property when he pulls down a house for the purpose of saving adjoining buildings. Any person exercising his common law right of abating a nuisance may, in the act, be injuring private property; and yet he is committing no offence. Indeed, the injuring or destroying private property is in general no crime, but a mere civil trespass, over which a magistrate has no jurisdiction, unless under the statute referred to in the argument; and to bring the case within that statute, the act must appear to have been *wilfully or maliciously* done. If this had been a warrant to apprehend the party for maliciously injuring private property, though it does not state whose the property was, there are many authorities which might be relied upon as sustaining it in that general form, though I am not prepared to say that they would conclusively support it against the objection. But upon the other point of the case, we are compelled to say, that the imprisonment was illegal; and that the justice could not but fail, as he has done, in making out a justification. The plaintiff, hearing of the complaint against him from the constable who had the warrant, went voluntarily before the magistrate, who did not examine into the matter and bail him, but allowed him to depart, with a direction to appear at the police office in the morning; and afterwards, the magistrate sends the constable to whom this warrant

had before been delivered, to take him in custody to the station-house, which he did that evening about 5 o'clock, and another justice, attending there, took bail and discharged him. Now whatever the facts may have been as to the truth or falsehood of the charge, we are bound not to assume it to be true before trial. For all we know the party may have been innocent; in which case it would have been an unwarranted annoyance; and it would at any rate be wrong, because unnecessary, that a justice, instead of examining into the complaint when he had the party before him, or sending him before another justice, if he were himself for any reason unable to attend to the matter, should let him depart, and then give a verbal order to a constable to apprehend him and take him to the station-house, or to the gaol. We consider it clear that this was an irregular proceeding. As to the other reason assigned, that he was to be taken there because he was alleged to have assaulted the justice on the previous evening, that would clearly not warrant the imprisonment. If it were true, that this plaintiff had assaulted the justice, the latter might, at the time of the assault, have ordered him into custody; but when the act was over, and time had intervened, so that there was no present disturbance; then it became, like any other offence, a matter to be dealt with upon a proper complaint made by the defendant upon oath to some other justice, who might have issued his warrant. Neither a magistrate nor a constable is allowed to act officially in his own case, except "flagrante delicto." while there is otherwise danger of escape, or to suppress an actual disturbance and enforce the law while it is in the act of being resisted. As we cannot hold otherwise than that the plaintiff was entitled to a verdict, the only question that remains is, whether we can properly set aside the verdict which he has obtained on the ground that the damages are excessive. We are of opinion that we cannot do so with propriety. The damages may be injudiciously high, and I fear they are so, both as regards the intention with which the magistrate acted, and the injury which the plaintiff has received; but while we have no authority to say that the plaintiff was really guilty of the offence, since he has not been tried, we cannot, without departing from the principles on which courts of justice act in such cases, say that the sum of 37*l.* 10*s.* 0*d.* is an excessive recompense for being taken in custody illegally upon a criminal charge; and as we could not grant a new trial except on terms of paying costs, it is not likely that the defendant would be benefitted by such an interposition. If the damages were much larger, the nature of the action alone would not prevent us from extending relief, and we should be inclined to do so: for it is to be regretted when an error probably unintentional involves a magistrate in consequences so serious. The verdict against the defendant being larger in our opinion than the case called for, but yet not so large as to make it proper for us to interfere in such a case, on the ground of excessive damages, we have kept the matter under deliberation so long as we were not fully satisfied that the imprisonment of the plaintiff could be only regarded as an illegal act; that doubt being removed, upon a full consideration of the case, we feel ourselves bound to discharge the rule (a).

DOE DEM. DUNMER *v.* BENTON.

Notwithstanding the late act abolishing imprisonment for debt, an attachment may still issue for non-payment of costs in ejectment under the consent rule.

In this case the court was called upon to consider whether, since the passing of the late act abolishing imprisonment for debt, an attachment could be ordered for non-payment of costs in ejectment under the consent rule.

Foster, counsel for plaintiff, moved.

ROBINSON, C. J.—The 9th clause of the statute 7 Vic. ch. 31, seems at first sight to prohibit the issuing an attachment for the costs in ejectment, but in comparing that clause with the seventh, we think that the prohibition is only against issuing attachments for costs “ordered to be paid in the progress of a cause”, as distinct from the costs which result from the termination of the cause; and that for the costs in ejectment to be taxed upon the determination of the suit an attachment may still go, under the seventh clause of the act.

DOE DEM. KEOGH *v.* CALHOUN.

Mere possession of land by a debtor, constitutes *prima facie* a seisin in fee, and such an estate cannot be sold under an execution against goods and chattels.

In this case the plaintiff made title under a sale by the sheriff upon a writ of fieri facias; the execution was against goods and chattels; not against lands and tenements; and no other evidence was given of the title of the debtor than that he had been in possession of the property. It was objected at the trial that mere possession is evidence of a seisin in fee, and that such an estate could not legally be sold under a *fi. fa.* against goods. The learned judge allowed the plaintiff to recover, reserving leave to the defendant to move for a non-suit in term upon the objection.

Wilson, counsel for plaintiff.

Small, counsel for defendant.

ROBINSON, C. J.—We are of opinion that this rule must be made absolute. Under the *fi. fa.* against goods, a term in lands no doubt might have been sold, but there was no proof of any such term. The evidence given either proved nothing, or it proved *prima facie* a seisin in fee, which could not be transferred by the sheriff under this writ.

Rule absolute.

SIMPSON *v.* McDONOUGH, ET AL.

Where a partner, without collusion, gives orders in the name of a firm, for goods in the use of which he is himself in fact solely interested, and the goods are of such a nature that strangers cannot tell whether they might not be for the joint business of the firm, such orders bind all the partners.

In this case plaintiff had a verdict. The action was against the defendants who were partners in carrying on a particular description of business. One of the partners kept a boarding-house, at which the workmen employed by the firm, with other persons, were lodged. The action was brought

for provisions and necessaries supplied for this boarding-house, and furnished upon written orders signed by Gleeson, one of the partners and one of these defendants, in the name of the firm, some few of the orders being signed by one or other of the remaining partners. It was objected by defendants that as the boarding-house was kept for the profit only of the individual partner whose establishment it was, and the other defendants had no interest in it, although they were co-partners with him in their other business, therefore, the giving these orders by Gleeson was a fraud on the other partners, and they could not be made liable. There was other evidence to charge the partners, and the jury found for the plaintiff. Defendants apply for a new trial.

J. Boulton, counsel for plaintiff.

Hamilton, counsel for defendant.

ROBINSON, C. J.—We are of opinion that the verdict was right. The defendants were shewn and are admitted to have been partners, and the goods for this boarding-house were furnished by a third party upon the order of one partner, given in the partnership name; that no doubt binds the other partners. Strangers cannot tell, and need not inquire, what may be their engagements among themselves. It is a consequence of entering into co-partnership, that each may be bound by the engagements of the other in matters which, for all strangers can tell, may be for the joint business of the firm. It is only where a fraudulent collusion is shewn between one of the partners and the person furnishing the goods, to charge the firm for what has really been furnished for purposes unconnected with their affairs, that a recovery can be defeated.

Rule discharged.

DOE DEM. KING'S COLLEGE *v.* GRAHAM.

Where at the trial a defendant in ejectment endeavours to make title in himself, as the owner of the fee, and fails, he is precluded from defending himself upon the ground of want of notice to quit, or demand of possession.

In this case the defendant, who was occupying a lot belonging to King's College, attempted at the trial to shew that his father and he had been twenty years in possession of it, which possession would of course confer a title in fee to the land. Failing in this, he then gave evidence of possession upon some treaty between his brother, under whom he held, and the College Council for the purchase of the lot, and he contended that his possession having been thus recognized, he could not be treated as a trespasser, but was entitled to a notice to quit, or at least to a demand of possession. Whether he was so entitled was the question made at the trial; and a verdict was entered for the defendant, with leave reserved to the plaintiffs to move to enter a verdict in their favour, if the court should be of opinion that the facts proved did not entitle the defendant to a demand of possession.

Small, counsel for plaintiffs.

John Duggan, counsel for defendant.

ROBINSON, C. J.—The court are of opinion that when the defendant at the trial endeavoured to make out a title to himself as the absolute owner, by reason of twenty years' possession, he disclaimed by that act to hold under the plaintiffs, and could not afterwards raise an objection which

is inconsistent with a denial of their right. The rule is a strict and salutary one. When a defendant in ejectment attempts to prove himself the owner of the fee, all question about notice to quit is at an end.

Rule absolute.

DOE DEM. ANDERSON ET AL. v. ERRINGTON.

Where tenants in common bring their action upon a joint demise, and an application is made at the trial for a non-suit, they will not be allowed to amend by adding counts on separate demises.

The lessors of plaintiff in this case were tenants in common, and they brought their action upon a joint demise. It was objected at the trial that as tenants in common cannot join in a demise, the plaintiff must be non-suited. A motion was thereupon made to amend, by adding counts upon separate demises. The Chief Justice refused to permit the amendment, but allowed the cause to proceed, subject to the right reserved to defendant to move for a non-suit, in case a verdict should be given for plaintiffs upon the merits of the cause.

Gwynne, counsel for plaintiffs.

Crooks, counsel for defendant.

ROBINSON, C. J.—We are of opinion that the defendant is entitled to have his rule made absolute. It is clear that the decision of the judge at nisi prius, in refusing the amendment, cannot be reviewed, and upon that ground alone the defendant must succeed: for the objection which the amendment was intended to cure, is fatal (*a*). If we could review the decision upon the motion to amend, whatever is to be found of authority on the point is adverse to the allowing such an amendment (*b*), and though it is intimated in a note to Chitty's General Practice (*c*), that it *might* not have been improper in the learned judge to have allowed the amendment in the case referred to, yet it does not seem to have been done hitherto in any case.

Rule absolute.

PLAYTER v. TAYLOR.

A new trial will not be granted to a plaintiff in order to enable him to add to his verdict a trifling sum which he says was improperly allowed as a set-off to his claim on the first trial.

This was an application by plaintiff, who had obtained a verdict in assumpsit for 3*l.*, for a new trial, in order that he might have 14*l.* 8*s.* 3*d.* added to his verdict in such second trial, which he urged was improperly allowed as a set-off to defendant upon the last trial.

Wilson, counsel for plaintiff.

Hervey, counsel for defendant.

ROBINSON, C. J.—We think we ought not to grant a new trial, when there is no allegation of surprise, nor any complaint of misdirection, in order to enable a plaintiff to obtain an addition of a few pounds to his verdict, when he might have demanded particulars of set-off, and been prepared to resist the claim, and when we could only grant it on payment of costs.

(*a*) Doe dem. Poole v. Errington, 1 Ad & Ell. 750.

(*b*) 1 Moody and Robinson, 343. (*c*) 3 Vol. 43.

McKEE v. IRWINE.

Motion for a certificate for Queen's Bench costs under provincial statute 58 Geo. III, ch. 4, if not made until after several other causes have been tried, though upon the same day, will not be granted.

The question in this case is, whether a certificate to entitle a plaintiff to Queen's Bench costs under our statute 58 Geo. III, ch. 4, can be moved for and granted after several other causes have been tried.

Adam Wilson, counsel for plaintiff.

Eccles, counsel for defendant.

ROBINSON, C. J.—We are of opinion that it cannot be; even where such motion has been made, as was done in this case, upon the same day. The point is not new in this court. It was expressly determined in *Falls v. Lewis*, and *Pulton v. Williams*, many years ago. And we are bound by those decisions. They are not at variance with the English cases cited, as will be seen by any one who carefully compares the words of the respective statutes, on which the English decisions are founded. The expression in one of the English statutes (*a*) is, “unless the judge at the trial shall certify,” &c., and that, by a little ingenuity perhaps, has been construed to mean, unless the judge who presided at the trial shall certify: (i. e. certify at any time). The language of another English statute (*b*) is, “unless it shall appear to the judge at the trial, and be certified by him,” &c. There it has been holden, and probably with less scruple, that all that is required is, that it shall appear at the trial to the judge, &c., in which case he may certify at his leisure after the trial. The words of our act are, “unless the judge who tried the cause shall certify in open court, at the trial.” The difference is obvious: “the judge who tried the cause,” that directs who is to certify; then where is he to certify? “in open court;” and when? “at the trial.” Why should not “at the trial” be as mandatory in regard to time, as the preceding words are in regard to place? Unless they mean to prescribe the time, they are used to no end whatever. The construction constantly put upon these words by the court, has been known and acquiesced in for a series of years by the legislature, and we think it right to conform to it.

DOE DEM. AUSMAN v. MUNROE.

QUÆRE.—Whether a judge at nisi prius can properly allow an amendment to be made in the name of the lessor of the plaintiff.

Ejectment for land in the township of Markham. Plaintiff has a verdict, subject to the opinions of the court on certain points moved at the trial. Defendant now moves to set aside the verdict, and that a verdict be entered for defendant, on leave reserved at the trial, or for a new trial with costs, on account of the learned judge having allowed an amendment to be made in the name of the lessor of the plaintiff at the trial. It was proved at the trial, that one Henry Ausman, senior, had lived for many years in possession of the whole Lot No. 10, in the third concession of Markham. And that some years ago he with-

drew from it, and left the province, having first (on 1st October, 1834) made a deed of fifty acres of the lot to his son Henry Ausman, for a consideration expressed on the deed of 50*l.* The deed is evidently drawn by some unskilful person. The grantor "bargains, sells, remises and quits claim unto the party of the second part in his actual possession now being and to his heirs and assigns forever, under the reservations, limitations and *prescriptions* herein particularly mentioned, that is to say, neither to be sold, barted nor exchanged, under no pretence, nor in any form or shape whatever, excepting to the descendants of the said party of the first part, or to some near of kin ; but shall devolve from heir to heir continually and for ever. Reserving to the said party of the first part all pine trees now standing on the above mentioned premises, as well as the stone that may be found thereon. And lastly, nevertheless, if the said the said party of the second part, or any of them, shall violate or break any of the above limitations, reservations, and *prescriptions* contrary to the true intent and meaning thereof, then these presents shall cease, and every matter and thing herein contained shall be utterly null, void and of none effect, any thing herein contained to the contrary in any wise notwithstanding." Plaintiff at the trial proved only that Henry Ausman, the father, had lived many years on the lot, and left it, having put his son, Henry Ausman, in possession of part of it, (the west fifty acres), and that the defendant, Munroe, had come in under Henry, the son, upon some agreement to purchase. The demise was laid in the name of *Jacob Ausman*, not Henry Ausman, and the plaintiff's counsel, seeing this difficulty in his case, moved to amend by substituting Henry Ausman for Jacob Ausman as lessor of the plaintiff. It was opposed by the defendant, but the amendment was allowed to be made. It was in evidence that there was a Jacob Ausman of the same family, who is now out of the province. The jury found at the trial that Henry Ausman, the younger, had not alienated the land contrary to the condition in the deed, but that he, or persons claiming under him, had taken pine timber and stone, contrary to the reservation in the deed ; of which fact there was evidence. The learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move for a verdict to be entered in his favour, if the court should think that the taking away of timber and stones, by persons holding under Henry Ausman, junior, would not work a forfeiture of the estate under the terms of the deed. The objection taken to the amendment is also renewed as a ground for a new trial, if the court should not be in favour of the defendant on the other ground.

Boulton, counsel for plaintiff.

Ewart, counsel for defendant.

ROBINSON, C. J.—We are of opinion that the defendant was entitled to a verdict upon the evidence, and that this rule, therefore, must be made absolute. The title endeavoured to be made out at the trial was, a title in Henry Ausman, the elder ; and setting aside all question as to the competency of the judge at the trial, to allow the substituting one person for another as the lessor of the plaintiff, by way of amendment, it is clear to us, that it was not proved at the trial, that the title was in Henry Ausman, senior, at the time of the demise. The possession of Henry Ausman was at first relied upon, as being all the proof it was necessary to give of his title. Then the defendant, who had gone into possession,

it seems, under Henry Ausman, the son of the lessor of the plaintiff, produced and proved a conveyance to him from his father. This put an end to the father's title to the land conveyed by that deed, unless the lessor of the plaintiff could repel it, as he endeavoured to do, by shewing, that under a condition contained in that deed the estate had become his again, by reason of a forfeiture. But we are of opinion that the jury found rightly, upon the evidence that Henry Ausman, the younger, had not alienated the land in breach of the condition; and further, that the taking stone or timber by persons claiming under him, would not work a forfeiture. The condition applies only to the alienation (whatever its effect might be as to that). The timber is reserved; the grantor has his right, and his remedy for that. It would not be a reasonable construction, to hold that the taking a stone, or cutting a tree, would forfeit the estate. "If the party of the second part shall violate any of the above limitations, reservations or *prescriptions*:" the word "prescription" is insensible. "Limitation and reservation," both will be answered by referring them to the restriction respecting alienation; but as to the reservation of the timber and stone, that is so much withheld from the grant, they belong to the grantor still, whether severed or not; and nobody can "violate the reservation" by taking the one or the other, the reservation will still continue as before. It is unnecessary for us to decide upon the question respecting the amendment, as we think the plaintiff could not properly recover.

Rule absolute.

IN RE CLERK OF THE PEACE v. WESTERN DISTRICT MUNICIPAL COUNCIL.

Where the Treasurer of the District Council refuses to pay the account of the Clerk of the Peace, for certain services, and returns to a writ of mandamus nisi, that such charges are not shewn by the Clerk of the Peace to be connected with the administration of justice, or to have been specifically provided for by law, so as to render it necessary that they should be audited by the District Council, and returns further, that there were no funds in his hands out of which he could pay those charges; the return was allowed.

In this case a mandamus has been moved to compel the treasurer to pay to the clerk of the peace an account audited and ordered to be paid by the justices in quarter sessions, in April, 1843. On the 11th April, 1843, the justices in quarter sessions audited the clerk of the peace's account, amounting to $38l. 2s. 0\frac{1}{2}d.$, and made an order on the treasurer to pay it. The district council, it appears, had passed a resolution on the 12th November, 1842, that the treasurer "shall pay no money upon other warrant than those issued by the warden, and that no warrant shall issue unless for such claims as the auditors have approved." It is shewn by affidavit, that on 3d June, 1843, Paul J. Salter, as agent of the clerk of the peace, went to the treasurer's office with the justices' order or warrant, and demanded payment of one W. R. Wood, Esquire, who performed the duties of treasurer, and received for answer that the treasurer could not pay the warrant, because he was forbidden by the resolution of the district council (above mentioned). The account in question was audited by the auditors of the district council at $25l. 9s. 3\frac{1}{2}d.$ only, striking off $12l. 12s. 9d.$ Upon the application for the mandamus, it was not shewn expressly what articles were struck off, but we could gather from a copy

of the account annexed to the affidavits, that the items disallowed were a charge of 4*l.* 17*s.* 6*d.*, for seventy-eight circulars sent to magistrates by order of the chairman of quarter sessions; also 3*l.* 10*s.*, for amending and carrying out amount on assessment rolls for seven townships, at ten shillings each, and a second charge of 3*l.* 10*s.*, for the same service for seven other townships; also two charges of 7*s.* each, for filling seven assessment rolls and seven population returns, at sixpence each. The return now made to the mandamus, assigns for reasons: first, that the warrant granted on 3d June, 1843, and signed by the clerk of the peace himself, mentioned no items, and there were no vouchers accompanying it; it was only *for a sum*, not saying on what account, and the treasurer could not therefore tell whether it was audited, or whether it was such an account as by law he was absolutely bound to pay; secondly, that there were no funds applicable to administration of justice under second head or fourth head in 4 & 5 Vic. ch. 10, even if the account, on the face of it, came under those heads, and for those two causes the return says payment was refused, but the treasurer could *not* have paid it if all had been regular, and if it had appeared to come under the second or fourth heads of charges; thirdly, the return then applies itself to the account as sworn to and filed when the mandamus was moved, and admitting that to be the true account of the items of the warrant presented, it gives reasons why the treasurer could not pay them, even if there had been funds, but repeating that there were no funds, first, as to 4*l.* 17*s.* 6*d.* for seventy-eight *circulars* sent to magistrates, the answer is, that it had nothing to do with the administration of justice, that there was nothing to shew that it is allowed by any statute, that it was not done under any order of the quarter sessions, and the object of the circular is not shewn; second, filing assessment rolls and population returns, 7*s.*, that this does not belong to the administration of justice, and is not allowed by any statute; third, amending and carrying out amount on assessment rolls for seven townships, 3*l.* 10*s.*, that this was the duty of the assessors, and not of the clerks of the peace, by 1 Vic. ch. 21. sec. 14; two other charges of same kind liable to same objections; fourth, writing a letter to town clerk of Zone, 1*s.* 3*d.*, that this is not allowed by any statute, and is without authority.

Cameron, counsel for plaintiff.

Foster, counsel for defendant.

ROBINSON, C. J.—The resolution of 12th November, 1842, I apprehend did clearly exceed the authority of the council. They have no right to subject to the allowance of their auditors any accounts for services which are directed by act of parliament to be recompensed by fees, independently of their authority. Of that there can be no doubt, after reading the 30th, 31st, 33d, 36th, 39th, 58th, 59th and 60th clauses of that statute. If, therefore, the treasurer gave as the reason why he could not pay the warrant in favour of the clerk of the peace when presented to him on 3d June, 1843, that the account which it directed to be paid had not been audited by the auditors appointed by the district council, he assigned a reason that was clearly illegal and insufficient, if he meant it to apply generally in this sense, that *every account*, for *every service*, must be so audited and signed by the warden before it can be paid. But it is stated in the return to the mandamus nisi, that this warrant afforded no

means to him of knowing what the charges were. That was, I think, a good objection, for while he saw nothing to shew that the payment was sanctioned and directed by the district council, he saw nothing either to shew that the account was for services authorised by law independently of the council. Now, however, we have the whole case before us: we see what the charges are, and that there are several among them which the auditors of the council have taken upon themselves to disallow, and that the clerk of the peace insists on his right to have those paid on the ground that he has a right to them by law; and that they are out of the scope of the council's authority, either to allow or disallow them; that they have nothing to do with them; and that it was and is the duty of the treasurer to pay these excepted items without regard to the auditors or to the district council. The treasurer, on the other hand, returns for his answer that the excepted items, of which there are six, amounting in all to 12*l.* 12*s.* 9*d.*, are none of them such as he is authorised by statute to pay, and are none of them for services which are without the scope of the district council's authority and duties, under the statute 4 & 5 Vic. ch. 10. He returns as an additional reason for not paying them, that if they came under the head of public service, which regards the administration of justice, which is the *second* in order of those purposes to which the district funds are to be applied in succession, as directed by the district council act; or if they came under that class of services which the district council have no controul over, and which ranks as the fourth head of expenditure in the statute, that he, the treasurer, had not on 3d June, 1843, or at any time since, and has not now any funds out of which he could have paid, or can pay for such services. Upon the first point we asked the applicant to point out under what particular legislative or other authority he claimed to have these several charges paid him by the treasurer, independently of the council. If he could shew that they were services required and provided for by law, in matters that the council have no controul over, then, under the 58th clause of the 4 & 5 Vic. ch. 10, his right would be clear, and the treasurer, supposing him to have funds, would have nothing to do but to pay the money, without waiting for any thing to be done by the council, or any of their officers. We have not been referred to the authorities, as we expected to have been, but the learned counsel for the clerk of the peace instead of this, confined himself to taking exceptions to the return to the mandamus, as being argumentative, inconclusive and inconsistent, and bad in some of the reasons it assigns. Now upon that point, no doubt there are cases, and that cited of the Queen *v.* Mayor and Alderman of Norwich (*a*), is perhaps the strongest, in which the court has granted a peremptory mandamus because the return was repugnant and contradictory, even where a matter was returned which would have been sufficient if it had stood by itself. But in that case one of the judges (Powis, J.) thought that they ought not to grant a peremptory mandamus, notwithstanding any repugnancy, where it appeared on the return that the right was against the person suing out the writ. In Rex. *v.* the Mayor of York (*b*), the court quashed a return in toto, because one part of it was inconsistent with another, and they granted a peremptory mandamus to swear in the officer

(*a*) 2 Lord Raymond, 1244.

(*b*) 5 T. R. 66.

whose election was the subject of dispute. They said they had the less reluctance in doing this, because their decision would not be conclusive, since the title of the officer might still be questioned afterwards in a quo warranto information. But we must be careful here not to direct public money to be paid into the hands of an officer, unless we see that he has a right to it: for such an act, being done, is final in its nature. And we should do wrong to order the money to be paid, if on the face of the return any sufficient reason is stated why the treasurer ought not to pay it. In *Wright v. Fawcett* (*a*), Mr. Justice Yates says, "mandamus are distinguished from civil actions: civil actions concern private rights between party and party, nothing is in question wherein the public is concerned, and the defendant must in these private cases know his own defence, and on what ground he is to put it; but in a mandamus relating to a public office, the question is, whether the person ought or ought not to be admitted to the office, and if he can be shewn to be an usurper, the court will not admit him, for *they ought not* to admit an usurper; the question is, whether upon the whole matter he ought to be admitted." In that case, and in many others, it is said the person to whom the writ is sent may return as many answers as he will, provided *they be consistent*. The return may be insufficient in part, and liable to be quashed *in part*, as was done in *Rex. v. Mayor, &c. of Cambridge* (*b*). But this return is not inconsistent in assigning as it does, these several reasons, first, that the charges are not such as the treasurer was at liberty to pay, without the sanction of the auditors and warden, and secondly, that if they had been such, he had no money with which to pay them. The case of *Rex. v. Churchwardens of Taunton St. James* (*c*), fully upholds the return in that respect, and it is evident that it must be allowed not to be inconsistent. Where a return is complicated, the court has a discretionary power of disallowing some parts of it (*d*), but I see nothing that would warrant us in quashing this return *in toto*. There are some parts of this return which are in themselves objectionable. I mean the bye-law set out, from which it does appear that the district council has taken upon itself to prescribe regulations as to the auditing and payment of accounts generally, which in regard to some accounts are beyond the scope of their authority. But though the treasurer has set out these bye-laws for the information of the court, we cannot say that he relies upon them in his return to a greater extent than this: that they shew that the council has, by a general regulation, required that charges against the district funds shall be audited by the auditors, and signed by the warden, before they can be paid; and that as there are very many charges in respect to which they may properly require this rule to be complied with, it is incumbent on him, as treasurer, if there are any exceptions, to take care that he pays no accounts not audited, without seeing that they come within the excepted cases. When this warrant was presented to him on 3d June, he had no means, he says, of knowing for what services the charges had been allowed by the justices, and therefore, as there was no authority from the warden, or auditors, he could not pay it. Now that it is shewn what the charges were for, he alleges that they are not for services which must be paid for independently of any controul of the district

(*a*) 4 Burr, 2045. (*b*) 2 T. R. 460. (*c*) 1 Cowper, 413. (*d*) 2 T. R. 461.

council; and that if they were, he had not and has not now any funds for paying the account. If the latter reason is true, it makes an end of the question; if it is not true, the officer suing out this writ must take issue and go to trial upon it. If any of the six charges should be found to come under the second head of expenditure mentioned in the statute 4 & 5 Vic. ch. 10, it certainly would seem strange, and hardly credible, that there should be no funds to pay such charges, for in that case, the whole revenue must have been absorbed in the expense of collecting; but we have no right to determine that question of fact. As to the items coming (if any do) under the fourth head of expenditure, it might very possibly happen that there would be a deficiency of funds, because that branch of the expenditure comes after *all* the debts and liabilities of the district. And in regard to these as well as any other charges, the return that there are no funds out of which the treasurer can pay them, is an excuse which we cannot over-rule. If, indeed, the return is in that respect untrue, the clerk of the peace must take issue upon it. It is not therefore strictly necessary that we should form any opinion as to these six charges, whether they do or do not come within the controlling power of the district council, for if there are really no funds applicable to them, they cannot be paid. I will therefore only say, that it has not been pointed out to us, and that I do not clearly see that any one of those six charges is connected with the administration of justice, or is specifically provided for by law so as to be out of the control of the district council; we therefore allow the return, and decline to issue a peremptory mandamus.

CHENEY & BRECK v. TAYLOR.

Memoranda or heads of agreement, ascertaining no certain amount of rent, being preparatory to a letting, and under which no rent has been paid before the distress, do not constitute a present demise entitling the landlord to distrain.

These are two actions of replevin, the one upon a distress made on 29th August, 1842, for rent claimed as due on 30th June, 1841, the other on a distress made in October, for rent claimed to be due on 30th September, 1842. The avowry in the first action is for nine months' rent, ending on 30th June, 1832, "under a demise at a rent at the rate of 150*l.* a year, for the first *four months* of the aforesaid nine months, and at the rate of 200*l.* a year for the *last five* months of the aforesaid nine months, and being the residue thereof, payable quarterly." In a second plea, the defendant avows for three quarters of a years' rent, ending 30th June, 1842," upon a demise stated as in the first plea, but claiming a less sum in arrear. In the second action the defendant avows for a quarter's rent ending on 30th September, 1842, under a demise to defendant at a yearly rent of 200*l.*, payable quarterly. In both actions the plaintiffs reply non tenuerunt, and riens en arriere. It was proved at the trial of both actions, that on 24th May, 1841, a memorandum was signed by the parties, in these words:—"Memorandum of an agreement had, made and entered into, the twenty-fourth day of May, in the year of our Lord 1841, between James Taylor of the city of Toronto, merchant, of the one part, and Cheney & Breck of Rochester and Portland, dealers in stoves, of the other part. The said James Taylor hereby agrees to lease to the said Cheney & Breck, the lot of ground and house now

building thereon on King Street, for the term of three years from the time the said premises are fit to be occupied, at the rent of two hundred pounds currency over and above all taxes,—which said taxes are to be paid by the said Cheney & Breck,—provided the said Cheney & Breck satisfy the said James Taylor, by a respectable reference, that the rent will be secure. The said Cheney & Breck hereby agree to take the said premises for the said term, at the said rent and taxes aforesaid." And that afterwards, on 14th July, 1841, the parties signed another memorandum intended to specify particularly the improvements which were to be made in the premises to be leased, and the times at which they were to be respectively completed. This contained many heads agreed upon as the terms of the proposed lease. The same attorney was employed by both parties in the matter. He drew up a lease in conformity to the heads of the last agreement, but the defendant, Taylor, refused to execute it, and he afterwards, at his request, drew up a lease omitting some stipulations which Taylor had objected to having inserted, and the plaintiffs would not execute the lease in that form, so that no formal lease was ever made between the parties. The plaintiffs had not taken possession at the time of the first lease being tendered to Taylor to be executed. Whether they were or were not in possession when the second draft was refused to be executed by themselves was not clearly made out. The shop, which was to have been finished by 1st September, 1841, was not finished till late in that month. The house, which should have been completed—the two lower stories by 1st November, and the uppermost story by 1st December—was not wholly finished according to the memorandum of 16th July, until some time later in December, 1841, or afterwards. The plaintiffs went into possession of the shop about the 18th September. All that was positively sworn to in regard to the time of completion of the house, was that it was finished in *January*, 1842, though the window blinds were not put up and painted till the 1st or 2nd of July of that year. No gas lights were fitted in March, 1842. Nothing was specifically agreed as to when the plaintiffs might enter into occupation of the premises, but it was proved, though not clearly and certainly, that they took possession of the lower part of the house early in October, 1841. It was proved on the trial of the first action, that when the nine months' rent up to 30th June, 1842 (inclusive), was claimed from plaintiffs, they declined paying, on the ground that the defendant had not the premises finished by the time agreed on, and that they had, on that account, a claim upon him for damages according to the stipulations in the minute of 14th July, 1841. These are, according to first head, "The store is to be finished, ready to deliver up by, on or before the 1st September, under a penalty of 2*l.* per diem, for every day beyond it." And secondly, "The two first stories of house to be ready to occupy on or before the 1st of November, and the upper story on or before the 1st day of December, under a like penalty of 25*l.*" When the plaintiff's agent went to demand the quarter's rent due 1st October, 1842, the distress for which forms the subject of the second action, plaintiffs asked if it was the old balance he meant, and on being told it was not, they said they would consult their counsel. It was proved further, on the trial of the second action, that plaintiffs had paid 50*l.* for the quarters' rent (at 200*l.* per annum), from 1st October, 1842, to 1st January, 1843, but

under a reservation that their making that payment was to have no effect to their prejudice in these actions. In the first action it was contended at the trial on the part of the plaintiffs, first, that there had been no demise between the parties, and that they were in possession, during the period for which rent was claimed, viz., up to 1st July, 1842, only under an agreement for a lease, and not under a demise, and subject only to an action for use and occupation. Secondly, that at any rate, if the minute of 14th July, 1841, could be taken to constitute a demise, still no demise was shewn such as that stated in the plea, namely, at a rent after the rate of 150*l.* a year for the first four months, and of 200*l.* a year for the next five months, because such rates of rent were not agreed to be paid for any specified period, or any certain number of months, but were to be dependent on the time when the *whole house* should be completed. And if the agreement could be stated and relied upon as constituting a demise, it should have been stated truly, according to its terms, and then it should have been averred at what time the house was completed, and the 200*l.* rent should have been stated to have accrued from thence. Thirdly, that the evidence did not shew that the house was in fact completed at such a time as to entitle the defendant to rent at 200*l.* per annum, for the five months preceding 1st July, 1842, which would be from 1st February, 1842, or that in fact it had ever been completed. Fourthly, that the evidence shewed such delay in completing the shop and house, as entitled the plaintiffs under the first and second heads of the agreements, to penalties which would exceed in amount the rent claimed in this action, and that such penalties are of right to be deducted from the rent. The defendant had given credit to the plaintiffs for payments on account of this rent, claiming only a balance due him for the nine months of 54*l.* 10*s.* 8*d.*; and according to the evidence the penalties to which defendant was liable for his delays would have more than covered the rent.

Cameron, counsel for plaintiffs.

Duggan, counsel for defendant.

ROBINSON, C. J.—It appeared to me at the trial of the first action, that the minute of the 24th July, 1841, must necessarily be read in connection with the previous minute of 24th May, and was to be taken as an expansion and explanation of that agreement, not as superseding and annulling it, unless it were in any point repugnant. The second minute did not state fully who were to be the lessees, and did not specify the duration of the term; evidently considering that settled by the first minute. Then taking both papers together, it appeared to me that they might have the effect of constituting a demise, and not merely an agreement for a lease, although it is plain that a more formal lease was intended to be executed, and I intimated that opinion, though I was not confident in it: for the cases on this subject are somewhat conflicting. I thought, however, that the evidence did not shew such a demise as was pleaded, namely, to hold for the first four months from 1st October, 1841, at a rent of 150*l.* per annum, and from 1st February, 1842, at a rent of 200*l.* per annum. The demise, I thought, should have been stated in the plea to be as it was stipulated in the agreement, i. e., dependent as to the quantum of rent on the time when the house should be finished. And it appeared to me not to be a case in which I could allow an amendment avowing the house to have been completed on a certain day, and claiming

200*l.* rent from that day, because the evidence did not furnish precisely the grounds of such an amendment. I desired the jury to say whether they were satisfied that the whole house was in fact finished by 1st February, 1842, so as to give substantially a claim to the larger rent from that time, as laid in the plea. And with respect to the abatement of rent on account of the penalties claimed, I told the jury that I did not think, if the case had turned upon that, that the penalties could be thus set off against the rent. The jury omitted to find when the house was wholly finished, probably because they could come to no clear conclusion upon it, and they gave a verdict for plaintiffs, with 5*l.* damages. On the trial of the second action, having in the mean time considered the point, I felt more doubtful as to there being a term created between the parties by the written agreements, and if there was not, then the payment of 50*l.* for the quarter's rent due on 1st January, 1843, being made after the distress, would not, as I thought, give any help as to the right to distrain, because it could not have the effect of creating a tenancy from year to year retrospectively, but only thenceforward. And as it was proved that the defendant had refused to execute a lease which contained merely the terms and conditions embodied in the agreement of 14th July, objecting to none of the stipulations, it seemed to me that he thereby disaffirmed that minute as a demise between him and the occupants, and could not distrain afterwards upon it as a lease. The jury found in this suit, also, a verdict for plaintiff and 5*l.* damages: which was taken subject to the opinion of this court in the point, whether a demise had been proved such as would support the avowry,—which sets out a demise to hold upon a yearly rent of 200*l.*, payable quarterly. There was no doubt that for the period in question here, namely, from 1st July to 1st October, 1842, the house was completed, as much at least as it was at any time afterwards, and plaintiffs, it was proved, have paid 50*l.* for the quarter's rent next falling due. We have considered these cases upon the objections urged by the defendant, and my brothers are of opinion with myself, that the plaintiff had not, in either action, a right to distrain. There was, I think, no intention to do a wrong to the plaintiffs, and therefore it is satisfactory that the jury have given but moderate damages. But the law which authorises distress for rent, is one that must be strictly applied so far as the right to distrain is in question. I think now, though at the trial of the first cause I was rather of the contrary opinion, that the heads of agreement drawn up between the parties did not constitute a present demise,—not merely because they evidently contemplated a more formal lease, to be afterwards executed, for that alone is not in all cases a sufficient reason, though it has in some cases been held to be so,—but because these memoranda, or heads, ascertained no certain amount of rent, and were merely preparatory to a letting, and no rent had been paid before the distress which could enable us to say that the plaintiff occupied at that rent upon the conditions proposed and agreed upon, and there was no ground on which we could hold that before the distress the plaintiff did actually hold under a demise at the rent stated. I continue also to think, as I did at the trial, that the defendant did not support his avowry in regard to the terms of the demise which he set forth, even if the memoranda referred to would serve to constitute a present demise, for the defendant did not let the house to hold *from any certain day* at 200*l.*

yearly rent, but from the time the premises should be in the condition stipulated for, and it should have been averred according to the fact; then if the plaintiffs desired to dispute the fact of completion by the day named, they could have done so: but as it is, they could do only as they have done, namely, deny that they agreed *unconditionally to pay 200l. rent* from a given day, whether the house was finished or not, and I am of opinion that they were entitled to succeed on that issue. In the first action, moreover, I mean that which regarded the first distress, the plaintiffs, in my opinion, were entitled to succeed upon the broad merits of the case, for they shewed that the house was not in that state that entitled the landlord to say that the tenants held it at the full rent from the day named in the avowry.

Rules discharged.

PROUT *v.* POLLARD.

Where in an action on a promissory note, by payee against maker, the defendant places upon the record special matter in defence, and upon a trial proves such special matter, and obtains a verdict, the court will not grant a new trial on an affidavit by the plaintiff that he had no idea that the defendant really intended to set up such a defence, but supposed that it was pleaded merely to gain time, and therefore did not prepare to meet it, and likewise of his ability to meet such defence on another trial.

Action of assumpsit on a promissory note given by defendant to plaintiff, to which the defendant pleads a special defence. At the trial a verdict was rendered for the defendant, which the plaintiff moved to set aside, as contrary to law and evidence, and on affidavits.

John Duggan, counsel for plaintiff.

Gamble, counsel for defendant.

ROBINSON, C. J.—The defendant pleaded the special circumstances under which the note (as he alleged) was given, namely, to be discounted by the plaintiff, and the proceeds to go to pay a debt then due by him to the plaintiff. That the note never was discounted, but judgment was afterwards entered up for the debt, and payment enforced by execution. The plaintiff replied *de injuriâ*. The facts stated in the defendant's plea being proved at the trial, the jury gave a verdict for the defendant. The plaintiff has now moved for a new trial, alleging that he had no idea the defendant really intended to set up such a defence, and supposed the plea was put in only to gain time, and therefore was not prepared to meet it, which he swears he could do on another trial. The answer to this is, that the defendant placed his defence particularly and formally on record, and could do no more. The defendant also swears, and so does his attorney, that they made the plaintiff and his attorney well aware of the defence they meant to prove, and the defendant has filed affidavits fully repelling the plaintiff's affidavits.

Rule discharged, with costs.

JOHNSON v. BUCHANAN.

Where to a plea of non-assumpsit infra sex annos a plaintiff replies, the residence of the defendant beyond the jurisdiction of the court at the time the action accrued, and a commencement of the action within six years after a return, the sufficiency of proof of these facts is a question for the decision of the jury, and not a ground of non-suit.

Assumpsit on Common Counts. Pleas: first, non-assumpsit; second, a special agreement as to $55l.$, parcel of the demand, that the plaintiff should take certain lands in payment,—that the defendant tendered a deed of the land, and that the plaintiff refused to receive it; third, non-assumpsit infra sex annos. The plaintiff denies the agreement set out in the second plea, and to the third plea replies, that when the cause of action accrued, the defendant was without the jurisdiction of this Province, viz., in the State of New York, and first returned to the Province in June, 1843, and that he commenced his action within six years after such return. The defendant rejoins to this replication, that the plaintiff did not commence his action within six years after the defendant's first return to this Province. It was proved that the work was done in the spring of 1836, and that the defendant was at Drummondville in the autumn of that year. The jury found that the defendant was in this Province in 1836, but not under such circumstances as to afford the plaintiff a reasonable opportunity to prosecute his claim, and they found for the plaintiff $116l. 16s.$ The defence respecting the lots to be taken for $55l.$, was not made out. Leave was reserved at the trial, to move to enter a non-suit upon the issue on the Statute of Limitations.

Hamilton, counsel for plaintiff.

Baldwin, counsel for defendant.

ROBINSON, C. J.—The defendant has moved that a non-suit be entered according to leave reserved at the trial, upon the issue on the Statute of Limitations. That I am of opinion we can certainly not do, for upon the evidence given, it was a question for the jury, which we cannot take out of their hands. It was proved that the defendant had been in this Province, after this work was done in 1836, for two or three days, and that the plaintiff had transacted business with him, and I collect from the evidence, that the plaintiff was then in a condition to have brought his action, the work being completed. So far as that point alone was concerned, it might I think have been left to the jury with a strong direction to find for the defendant. And there would have been some ground to move for a new trial on the law and evidence, if they had found otherwise. But it was clearly proved at the trial, by *viva voce* evidence, that the defendant has recently admitted the demand to be unsettled, and that he is debtor to the plaintiff in a considerable sum. And there is a written statement signed by him in September, 1843, which is quite sufficient to take the case out of the Statute of Limitations. Under such circumstances, we ought not to set aside this verdict, because if we did, it would be but just to allow the plaintiff to amend his pleadings, so as to admit of evidence of this plain subsequent acknowledgment of the debt.

Rule discharged.

DOE DEM. MCKENZIE ET AL. v. RUTHERFORD.

In ejectment on a mortgage, the court will not order the proceedings to be stayed, and a re-conveyance under 7 Geo. II, ch. 20, on payment into court by the defendant of the money due upon the bond and mortgage, together with the costs in the action, where the whole amount secured by the mortgage is not admitted to be due, nor will a reference to the master be ordered, to ascertain the amount actually due in such case.

Ejectment on a mortgage. At the trial, the defendant, who is in as representing the mortgagor, now deceased, endeavoured to shew that the mortgage was paid before the day, 1st October 1838, but he failed, and under the direction of the learned judge, the plaintiff had a verdict. Mr. *Bell* now moves, that on the defendant's paying into court the money due upon the bond and mortgage, and the costs, proceedings in this suit be stayed, and that the premises be re-conveyed, under the statute 7 Geo. II, ch. 20. The mortgage was made 1st May, 1828, to secure 130*l.* 14*s.* 6*d.*, payable 1st October, 1828. It appeared on the trial, that the amount due on the mortgage had probably been paid up many years ago, to the plaintiff's agent, but that having subsequent dealings with Rutherford, the mortgagor, it is attempted to enforce the payment of the balance due on these later dealings under the mortgage.

Hagarty, counsel for plaintiff.

Bell, counsel for defendant.

ROBINSON, C. J.—This application is made under the statute 7 Geo. II, by the heir of the mortgagor, and is resisted on the ground that the payment of the mortgage is disputed,—that the accounts between the parties cover a number of years, and are complicated. The verdict necessarily went against the defendant, because, whether the mortgage had appeared to the jury to be paid up or not, it was evident that it had not been paid by the day. The defendant swears to his belief that the mortgage is fully paid up, and that no proceedings whatever have been taken under it since it was given in 1828, till 1843. It seems to have been held, and the decision is grounded on the express words of the statute, that its provisions can only be applied to cases in which the sum is admitted to be due which the mortgage on the face of it is given to secure. We have no power to submit it to the master to take an account upon evidence, and possibly conflicting evidence. In *Huson v. Hewson*, (*a*) that point was fully determined, though there are cases and expressions in the books which it is not easy to reconcile with this strict construction.

Rule discharged.

GOODERHAM, ASSIGNEE OF SHERIFF, DISTRICT OF GORE, v. CHALMERS, RITCHIE, AND BEASLEY.

Where judgment is recovered in an action against two parties, jointly liable, and at the instance and for the benefit of one of the parties, who pays the debt without the costs, the plaintiff proceeds to enforce payment of the whole amount from the other party, the court will order the damages assessed by a jury, on the breach assigned in an action on a limit bond, given by that other party, to be reduced to the costs and charges in the original

action.—Where payment is pleaded under the rule of court which directs that all payments shall be specially pleaded, the party pleading payment of a larger sum is not thereby prevented from giving evidence of payment of a smaller sum, in reduction of damages, although the issue on the plea must be found against him.

Action of debt on bond given to the sheriff by the defendants, that Chalmers, who was in custody on a ca. sa., in *Gooderham v. Chalmers*, should not depart from the limits. The defendants plead that the judgment against Chalmers had been fully paid and satisfied before the alleged breach of the bond now declared on. *A. Wilson* moves, on leave reserved at the trial, that the damages which the jury assessed on the breach of the bond assigned, at 123*l.* 19*s.* 9*d.*, should be reduced to the costs and charges of the original action of *Gooderham v. George Chalmers*. *Gamble, contra.*

ROBINSON, C. J.—At the trial, it appeared that Chalmers and Hopkirk were liable as parties to a note held by plaintiff, and that Hopkirk paid the note, but it was not proved that he paid the costs of the action upon it. *Gooderham*, at Hopkirk's instance, persevered in his remedy against Chalmers, in order to compel payment from him, as Hopkirk asserted that the debt was contracted on Chalmers' account, and that he himself was merely a surety. It was objected, first, that at any rate the costs were not paid; secondly, that upon a plea of payment of the whole demand, in *Gooderham v. Chalmers*, in bar of this action on the bond, a partial payment—that is, of the debt only—could not, since the new rules, be given in evidence in reduction of damages, and *Hodgkinson v. Wyatt* is cited (*a*). We are of opinion this rule should be made absolute. We do not find that the case cited, or any other case, goes that length, and it seems to us that such a principle would lead to consequences very unjust and inconvenient. The only effect of the new rules of pleading in this respect is, that no payment, whether total or partial, shall avail a party unless it is pleaded. It is contended that the meaning of this rule is, that if a full payment is pleaded, full payment must be proved, or the plaintiff must inevitably recover the whole of his demand, though the greater part has been shewn to the jury to have been paid. Then, of course, on the same principle, if 100*l.* is demanded, and a defendant pleads payment of 50*l.*, but at the trial proves only 40*l.* paid, he could not have the benefit of it, but the plaintiff must recover the whole 100*l.* We see nothing to countenance such a position; the case of *Cousins v. Padden* (*b*), is certainly against it, and it is inconsistent with what is constantly done under the plea of set-off, when although sufficient is not proved to bar the demand, as was pleaded, nevertheless, the damages are reduced pro tanto. Just as in the case of the plea of solvit ad diem, if the defendant proves payment of part only, the plaintiff, in assessing damages on the breach suggested, recovers only for so much as is still unpaid. As was said by Lord Denman, in *Moore v. Butler* (*c*), “the issue under nil debet, (upon a plea of set off), is not whether a sum is due from plaintiff exceeding or equal to the amount of his demand. Unless such a sum is due, the plea would be no bar to the action, although the evidence might reduce the damages.”

Rule absolute.

(*a*) 8 Jurist, 216.

(*b*) 2 Cr. M. & R. 547.

(*c*) 7 Ad. & Ell. 600.

RAINES *v.* THE CREDIT HARBOUR COMPANY.

Semblé, that a municipal corporation may contract to hire a clerk or servant, to render services in the ordinary business of the corporation, without using their corporate seal. And such servant may sue on the contract. A declaration setting out a contract to pay a certain sum per year, for services, as long as a party should remain in such service, and a readiness and willingness to continue, will not entitle a party to recover for a wrongful turning away, unless the declaration plainly and directly alleges that the defendant did agree to retain the plaintiff in his service for the period within which he is stated to have been dismissed.

Action of assumpsit, to recover one year's salary, amounting to 85*l.* The declaration sets forth an undertaking on the part of the defendants to pay the plaintiff 85*l.* a year, as long as he should continue in their service as Harbour Master, &c.; that the plaintiff entered into the service of the defendants on the terms aforesaid, and continued to serve until on the 29th day of June, 1843, without any notice, and although the plaintiff was ready and willing to remain and serve on the same terms for the remainder of the year then current, the defendants, without payment of his salary, wrongfully dismissed him and refused to continue or employ him for the remainder of the said current year. The defendants, in their second plea, aver that the plaintiff entered into and continued in their service from the 24th May, 1841, until the expiration of the second year of such service, on the 23d May, 1843, and no longer, and that the plaintiff then voluntarily left their service; and further states a payment to the plaintiff by the defendants, and acceptance by the plaintiff, of 200*l.*, in full satisfaction and discharge of the undertaking in the declaration mentioned, and of all damages sustained by the plaintiff, by reason of the non-performance of the said undertaking. To this plea the plaintiff demurs, and shews for cause, that the plea contains only an argumentative denial of the breach alleged, in stating that the plaintiff voluntarily left the service and employment of the defendants. That the plea is double in alleging a voluntary leaving the defendant's service as an answer to the breach, and also payment in satisfaction of the same breach. That the plea is insensible and repugnant in denying the breach of contract in one part of it and admitting it in another; and that the plea is in other respects uncertain, &c. The defendants join in demurrer, and on the argument objected to the plaintiff's declaration as insufficient, for the reasons stated by the Chief Justice in delivering the judgment of the court.

J. H. Cameron, counsel for plaintiff.

Hagarty, counsel for defendants.

ROBINSON, C. J.—There can be no doubt that the plea in this case is bad. It does not traverse the wrongfully dismissing, which it should have done. And it is inconsistent in denying, though argumentatively, a breach of the alleged contract, and yet at the same time averring satisfaction of damages for not performing the agreement. But the defendants have taken exceptions to the declaration:—they object that no action of assumpsit can be maintained against them as a corporation upon a transaction of this description; that is, upon an executory and not an executed agreement. They object further, that the breach assigned is inconsistent with the effect of the undertaking, and that it ought at all events to have

been averred that the defendants had notice of the plaintiff's readiness to continue in service, or that the plaintiff offered to remain. In my opinion the plaintiff has not laid a sufficient foundation for his action of assumpsit; I mean treating the case as one between party and party, without regard to the question of the liability of the defendants as a corporation. The plaintiff has set out a contract of hiring for no definite period, at a yearly salary. He does not say at what time he entered into the defendants' service under that agreement, but leaves us, I suppose, to infer that his service commenced on the day on which he states the agreement to have been made, which however by no means follows. Then if we should assume that to be the commencement of the service, it ought to have been shewn that the defendants contracted to retain the plaintiff in their service for a period beyond that when they are alleged to have wrongfully dismissed him. If we could clearly see on the face of the declaration that a new year had commenced, the plaintiff ought to have charged expressly that the defendants undertook to retain him in their service till it ended. He may mean to rely upon such an undertaking arising by implication from the terms of the agreement, but he should nevertheless have stated that the defendants did agree so to retain him. As the declaration stands, the plaintiff is claiming damages for the breach of an agreement, but has not stated the agreement. The case of *Aspden v. Austin*, lately decided in England (*a*), is a case of this description. It may be doubted whether the facts of this case would have warranted the plaintiff in stating it as part of the agreement, that the defendants should retain him in their service for the full year; but however that may be, if the plaintiff grounds his action upon such supposed contract, he should have charged it. It appears to be still an unsettled point, whether, in such a case, a plaintiff claiming wages to the end of the year, on the ground that he was willing to serve, and had been wrongfully dismissed, may sue for his wages on the common counts, or whether he must sue upon a special agreement to retain in service to the end of the year, relying upon the terms of the hiring for establishing that. This plaintiff has neither done the one nor the other, and his declaration, I think, is bad for the reason assigned, that he is going upon a breach of an agreement, but has not stated such an agreement as he alleges to have been broken. Upon the exception taken by the defendants, that they are not liable as a corporation to be sued in assumpsit on an executory agreement, I should not have been so clearly in the defendants' favour, but I confess I have not been disposed to look strictly into a legal exception of this kind, which the defendants have merely thrown before the court, neither party thinking it worth their while to argue it. It is true, we had this point before us, and found it necessary to go into it extensively, in a late case of *Hamilton v. The Niagara Dock Company*, but it was not the single point on which that case turned. We found then, on investigating the subject, that there was a growing inclination in the courts in England, to relax the principle which these defendants rely upon, from a natural desire to accommodate the administration of the laws to the varying nature of commercial transactions. But we found also, that wherever the principle was sought to be wholly set at nought, or the court were pressed to

regard it as in a manner obsolete, and to look upon the contracts and liabilities of corporate bodies, and of individuals, as resting upon the same footing, then the court had held themselves disabled, by the current of authorities, from going the desired length; and that, in several recent cases, the doctrine seemed, upon mature consideration, to be rested very nearly upon its old ground. In a late case reported in the *Jurist* of last year, page 654, the court conformed to what had always been the prevailing current of authority upon this point; but in that case, as in many others, they speak of corporations for municipal purposes, as standing on a somewhat different footing from trading corporations, so far as concerns the application of the principle that their seal is necessary to the making a binding contract. This difference is in general rather hinted at in general terms than explained in such a manner as can enable us to discern the extent of the difference.. I take it to consist principally in this, that as corporations for trading purposes can hardly carry on their business without accepting and drawing bills, and making themselves parties to notes in the common course of commercial transactions, it has been therefore held that they may do these acts in the manner in which they are always done by others, without the tedious solemnity of affixing their seal ; but as municipal corporations are not under the same necessity for engaging in such transactions, they cannot claim the same facility on the same ground. With regard, however, to both descriptions of corporate bodies, it has always been a recognized qualification of the principle which requires the use of their seal, that there are certain small matters of such frequent occurrence in the course of conducting their affairs, that it appears to be of necessity that they should be allowed to transact them without going through the formality of a sealed instrument, and the hiring of servants to perform their ordinary business has from a very early period been one of these exceptions. Now whatever advantage it might give the plaintiff in this action, to be able to treat the defendants as a trading corporation, I think he is entitled to it, for I think they are fairly to be regarded in that light ; and I am not prepared to say that a hiring of an accountant or clerk is not such a matter as might be done by the defendants without their seal. And if so, it ought, in my opinion, to follow that they must be held to all the legal liabilities of such contracts, in the same manner as other contracting parties ; and that such liabilities may be urged in the same description of actions. Upon this point of the case, therefore, my present impression is, that the plaintiff's action would not have failed upon that ground ; but we do not give our judgment upon that exception, because, in our opinions, the plaintiff's action fails on the other ground, viz., that he has not stated the assumpsit on which he meant to sue ; and, that the defendant must therefore have judgment on the demurrer.

HAMILTON, EXECUTRIX *v.* DAVIS AND FORD.

A party giving a bond to hold harmless in any actions that may be brought, and to pay all costs and charges thereby accruing, is bound to indemnify as well against the legal result of any such actions as for the trouble and expense occasioned to the party, to be indemnified by the bringing of any such action.—In an action brought on a bond of indemnity, a defendant may plead that the payment made by the obligee was without necessity, and made in his own

wrong. It is not necessary since the new rules, even in cases commenced previous to their coming into operation, that a replication should commence with precludi non, or conclude with a prayer of judgment.

Action of debt on a bond dated 20th December, 1836, given by the defendants to Alexander Hamilton, sheriff of the district of Niagara, deceased, with condition "to hold the sheriff harmless in all actions that might be brought against him, his heirs, executors or administrators, by two men employed by the sheriff to guard the property of Davis when seized by the sheriff on an execution against Davis and others, at the suit of Matthew Crooks, for wages claimed by them, and to pay all costs and charges that might accrue by said actions." The defendants, after craving oyer of the bond and condition, plead, first, non est factum ; secondly, non damnificatus ; thirdly, general performance. The plaintiff, to the second plea replies, that as executrix of the said sheriff, she had been called upon and obliged to pay, and did pay to each of the said men, for guarding the said property, 9*l.* 15*s.* 6*d.*, together with 5*s.* 4*d.*, costs, in an action brought by each of the men against her as executrix ; and that thereby, as executrix, she was damnified to 20*l.* 1*s.* 8*d.* To the third plea, a similar replication as to facts, and alleging non-payment, by the defendants, of the sum recovered. To these replications the defendant demurs, and shews the following causes : That the replications do not commence with the formula of precludi non, nor conclude with any prayer of judgment ; and that there is nothing shewn in either of the said replications of a damnification to the plaintiff within the meaning of the condition of the bond. The plaintiff joins in demurrer.

Eccles, counsel for plaintiff.

Cameron, counsel for defendants.

ROBINSON, C. J.—The point in this case presented by the demurrer is, whether the plaintiff has shewn a breach of the condition of the bond on which she sues. The objection raised by the defendants is, that they cannot be made liable otherwise than by shewing that in an action brought by the two men referred to in the condition of the bond, they have recovered by the judgment of the court against Mr. Hamilton, or his representatives ; as they only engaged to hold him and them harmless "*in any action*" which those men might bring ;—not to indemnify against the trouble or expense of their bringing any action however groundless. The plaintiff, on the other hand, insists that the defendants' undertaking is not merely to abide by the legal result of any such action, but that they are bound to indemnify her against an action being brought, whether well or ill founded ; and that the moment an action was brought, and any damage thereby accrued to the plaintiff, the bond was forfeited. On the plaintiff's behalf the case of *Kerr v. Mitchell* (*a*), has been relied upon as an authority in her favour. To me it seems at least very questionable whether it can be so considered, when we compare the condition of the bond in that case with the condition of the bond before us. But the question in this case is one on which my brother judges, before whom it was argued, have, as well as myself, entertained much doubt ; and in order to enable us to dispose of it, we were desirous of being enabled to avail ourselves of the opinion of one of my learned brothers, who was not present at the argument.

(*a*) 2 Chitty's Rep. 497.

From the smallness of the amount in litigation, probably, the parties were unwilling to incur the charge of a second argument. The result of the consideration which we have given to the case is, that we recommend to the defendants to withdraw the demurrer; and if they are advised that they can substantiate the defence, that the plaintiff submitted to the charge for which she was sued in the division court without necessity, and made the payment therefore in her own wrong, we give them leave to plead that defence, of course on paying the costs of this demurrer, and of the amendment. If the defendants do not pay the costs accrued before next term, judgment will then be given for the plaintiff on the demurrer. Two of my brother judges who were present at the argument of this case, are clearly with the plaintiff upon the sufficiency of her replications. One of my brother judges is of a different opinion. I have felt much doubt on the point; but as I am not convinced that the replications are bad, I should not differ from my brothers who in their opinions uphold them, and therefore shall concur with them in the judgment if it becomes necessary to give it.

MORTON v. THOMPSON.

Where a defendant, sued as acceptor of a bill, pleads that after the acceptance by him, and upon the action brought, plaintiff indorsed and delivered the bill, upon a good consideration, to a person whose name is unknown to defendant, and plaintiff replies that at the commencement of the action he was, and still is the holder of the said bill,—not denying expressly the fact pleaded of his having indorsed the bill for a good consideration,—the replication was held bad on demurrer.

The plaintiff sues the defendant as acceptor of a bill of exchange drawn by the plaintiff, in his own favour, at three months, for 500*l.* The defendant pleads, that after the acceptance, and before this suit, the plaintiff indorsed and delivered the bill upon a good and sufficient consideration, to a person whose name is unknown to the defendant; and that the defendant thereby became and is liable to pay the bill to such indorsee, who, from the time of such indorsement until, and at, and after the commencement of this suit, hath been and is the holder of the said bill, and this he is ready to verify. The plaintiff replies to this, that he (the plaintiff) at the time of the commencement of this suit was and still is, the holder of the said bill, “*and without this, he, the said plaintiff, saith that the person mentioned in the said plea, as unknown to the defendant, or any other person or persons, was or were, at the time of the commencement of this suit, or now is or are, the holder or holders of the said bill, and of this he puts himself upon the country,*” &c. The defendant demurs to this replication, because it does not deny the fact of the plaintiff having transferred and indorsed the bill for a good consideration otherwise than argumentatively, by affirming that he is still the holder; and that he does not directly deny that the person mentioned in the plea was and is the holder of the bill, except argumentatively, by setting up another affirmation, namely, that he himself was and still is the holder.

J. A. McDonald, counsel for plaintiff.

Eccles, counsel for defendant.

ROBINSON, C. J.—This case certainly is very like that of *Fraser v. Welsh (a)*, in which a replication nearly agreeing with this was held good.

That decision, I confess, does not seem satisfactory, for a replication in such a form—not denying the fact of indorsement of the bill for a good consideration, but merely affirming the fact that the plaintiff is the holder—leaves it uncertain whether the plaintiff means to deny that he ever did indorse the bill, or that he indorsed it for a good consideration, or whether he may not mean to admit that he did indorse and part with the bill, and to set up a new right acquired by again becoming repossessed of the bill. I cannot say that I could assume the correctness of that decision, and conform to it with a conviction of its being right, even if the replication in this case followed exactly the form of the replication in *Fraser v. Welsh*. But it differs from it in an important particular. There, the replication specially traversed the fact that the supposed person unknown was the holder of the bill *in manner and form as the plea alleged*. It did therefore deny that such person was the holder, as being indorser upon a valuable consideration, because that was the "manner and form" in which such person was alleged to be the holder. And it will be observed, that in the judgment the court rests upon the traverse of the unknown person being the holder *in manner and form*, which would include the alleged inducement for good consideration. But here the plaintiff does not in his replication specially traverse the fact of a third person having become the holder in manner and form alleged in the plea; but merely traverses that he was the holder. And besides, the special traverse is by some mistake and confusion of language made insensible and unintelligible. We know of course what was meant, but it is not expressed in such a way as to make it a good traverse,—the plaintiff in fact affirms that the supposed third party was the holder instead of traversing that he was. Being of this opinion in respect to the pleading, and holding the replication to be bad, we recommend to the plaintiff to amend, or there must be judgment against him. In case of amendment of course the verdict rendered must be set aside without costs, though upon the application which was made for that purpose, on other grounds stated in affidavits, I am not of opinion that we could properly have interposed. That rule, having as I conceive been fully answered by the plaintiff's affidavits, must be discharged with costs.

LAMPMAN ET AL. EXECUTORS OF LAMPMAN, *v.* DAVIS ET AL. EXECUTORS OF DAVIS.

An admission by an executor that a promissory note (barred by the Statute of Limitations) is due, coupled with a statement that it could not be paid for want of assets, and that if there were assets it should be paid, is a conditional promise merely, and not sufficient to take the case out of the statute.

The plaintiffs, as executors of Lampman, sue the defendants (not as executors otherwise than that they merely describe them as such) upon a promissory note given by the defendants to the plaintiffs' testator, and also on an account stated. The defendants plead that the cause of action did not accrue within six years. The plaintiffs reply that it did. At the trial, the plaintiffs proved that in 1843 one of the defendants admitted that the money was due, but that he and his co-executors *could not pay it as there were no assets*; that if there were assets, and he had the money, he would pay the amount. It was objected that this was only a conditional promise, not sufficient to take the case out of the

statute. The learned judge so ruled, and directed a non-suit, reserving to the plaintiff leave to move to set it aside and enter a verdict for $137l. 1s. 11d.$, the amount of the note and interest. A rule was accordingly obtained to shew cause why this should not be done.

Boomer, counsel for plaintiffs.

H. J. Boulton, counsel for defendants.

ROBINSON, C. J.—We are of opinion that the ruling was correct, both upon authority and in reason. It is true these defendants, by giving their own note for a debt of the testator, made themselves personally liable to the plaintiffs; but not as between themselves and the estate they represented. If payment had been enforced, then they could of course have made such payment and reimbursed themselves out of the assets of the estate. Here the plaintiffs, for some reason, allow the claim to rest so long that the Statute of Limitations disables them from recovering, and when they apply under such circumstances, the answer is, “we have no assets of the estate, if we had we would pay you.” This was certainly but a conditional promise, and it was a condition which it was just and reasonable that the defendants should have power to make; since they could not have been bound at all except by their subsequent acknowledgment. We may suppose it not unlikely that in the mean time the executors had been compelled to pay away all the assets of the estate to other parties, or had finally closed the affairs of the estate by paying over what remained to those entitled under the will; it was reasonable therefore in them to say “we gave the note as executors,” (which indeed the plaintiffs must have well known) “it is not paid, but we have no assets, if we had we would discharge it.” If the defendants had simply acknowledged the note, the law might have implied a promise to pay, and that would have been unqualified; but we cannot imply an unqualified promise where there has been only a conditional one.

Rule discharged.

DICKSON ET AL. EXECUTORS OF CLARKE *v.* STREET.

A devise of the use, possession and occupancy of a dwelling house and premises with land attached, together with furniture, plate, linen, china, library and other effects therein at the time of the death of testator, to occupy, possess and enjoy the said house, land, furniture and premises, during the natural life of the devisee, does not give such an interest in the personal property so devised, as to enable the devisee to dispose of them absolutely by will. And the executor of the testator, giving notice to the executors of the devisee, may, at a sale of such property (by the executors of the devisee) purchase, and subsequently on action brought resist the payment.

The plaintiffs sue as executors of the late Mrs. Mary Margaret Clarke, deceased, for goods sold and delivered by them, as executors, to the defendant. Pleas.—Non-assumpsit, except as to $23l. 6s. 4d.$ paid into court. Verdict for the plaintiffs $133l. 14s. 2d.$, subject to the opinion of the court on a case stated. A new trial was also moved for, without costs or with costs to abide the event, on the ground that the verdict is against evidence.

Burns, counsel for plaintiffs.

Draper, Q. C., counsel for defendant.

ROBINSON, C. J.—The late Hon. Thomas Clarke, by his will, after giving an annuity of $200l.$ to his wife, directed as follows: I also give and

bequeath unto my said wife the use, possession and occupancy of my dwelling house and premises, with about three acres of land adjoining thereto, and together with all my furniture, plate, linen, china, library and other effects therein, as also all the stock of horses, cattle and carriages that may be therein at the time of my death, to occupy, possess and enjoy the said house, land, furniture, and premises, during her natural life ; the said annual sum of 200*l.*, and occupancy of the said house with the above mentioned land and premises, to be in lieu of all dower and every other claim or manner of claim which she my said wife might or could have out of my estate." After Mr. Clarke's death, his widow continued to occupy his house, furniture, plate, &c., agreeably to the will, until her death. On 16th March, 1837, Mrs. Clarke's executors (the plaintiffs in this cause) exposed to sale by auction the furniture and effects left behind her, as the goods of her estate. The defendant was present at the sale, and bought goods to the amount of 104*l. 1s. 8d.*, which were put up at a credit of six months. A few of the articles had been in fact the goods of Mrs. Clarke, not derived from her late husband under the will ; the price of these is covered by the 23*l. 6s. 4d.* paid into court ; the remainder of the goods were part of the furniture, &c. bequeathed by Mr. Clarke to his wife, to be enjoyed by her during her life. The defendant is executor of the estate of the late Thomas Clarke, and as such, claims to be entitled on behalf of the estate to the proceeds of these last mentioned goods, and on that ground resists payment. It was found by the jury that the property sold (with the exception I have mentioned) formed a part of the estate of the late Thomas Clarke, at the time of his death. And some evidence having been given of the defendant's having declared at the place of sale, and just before the sale, in the presence and hearing of one of the executors of Mrs. Clarke (Mr. Campbell), that he claimed the property as belonging to the late Mr. Clarke's estate, it was submitted to the jury whether they were satisfied that Mr. Campbell actually heard this statement of the defendant, which was made not to Mr. Campbell, but in his hearing. The jury found that notice by the defendant that he claimed the property as the late Mr. Clarke's, and not to sell, was not proved. But at the trial a letter of Mr. Campbell's (one of the plaintiffs and an executor of Mrs. Clarke's) was put in which seems to preclude all possibility of question on this point, for its whole strain and tenor shew that the executor and Mr. Street had fully agreed to rest entirely on the point whether by law, under Mr. Clarke's will, Mrs. Clarke took such an interest in the personal goods bequeathed to her for life, that she could dispose of them absolutely by her will. This letter is dated 26th August, 1837, and addressed to the defendant. Among other passages in this letter of Mr. Campbell's, is this :—"Having concluded at our interview in July to submit the question to the most eminent counsel in the province, then to communicate with the friends at home and await their answer (as by the written document you will perceive), the executors of Mrs. Clarke will of course strictly perform their undertaking. After which they will take such a course as they consider themselves called upon to adopt under the circumstances. At present our opinions and determination are to insist upon Mrs. Clarke's right to make the disposition of the property by will, &c." In another passage he says "whatever the ultimate decision of law may be, we feel

ourselves in duty bound to pursue this course at present, *but keeping in view the several notices and objections made by you as well on the day of sale as upon other occasions.* Should it be determined in law that Mrs. Clarke had no power over the property in question, it or its avails will be forthcoming." Mr. Campbell, in answering the rule, files an affidavit with letters and accounts annexed, but I see nothing appearing in these to annul or diminish the effect of the inferences inevitably arising from his letter of August, 1837. We are of opinion, that the effect of the will is to give the late Mrs. Clarke only a life-interest in the chattels in question. The language indeed shews, that it was only the *use* of them for her life that was intended to be given to her, and it is now clearly settled that under such a disposition she cannot take an absolute property in them. So far, therefore, as our opinion on this point goes, the plaintiffs were not entitled to recover. And it is equally clear that the goods were purchased at the sale with a full knowledge that the defendant bid for them to prevent their passing into other hands, not acknowledging the right of the executors of Mrs. Clarke's estate to the goods or to the proceeds, but leaving that right to be determined upon deliberate consideration thereafter. It is wholly repugnant to the understanding which Mr. Campbell's letter expressly states, to contend that the representative of Mr. Clarke's estate is precluded from going into the question of right. And indeed one is at a loss to understand on what grounds it can be desired, in a case like this, where the facts must be perfectly well known to all parties, that any part of the proceeds of the effects of Col. Clarke's estate should pass into the hands of those who are clearly not entitled.

Judgment for defendant.

BANK OF BRITISH NORTH AMERICA *v.* JARVIS, SHERIFF HOME DISTRICT.

Where a party sues out process and serves the debtor personally, prior to the issuing of attachments under the Absconding Debtors' Acts, and obtains judgment before the attaching creditor, his execution is entitled to priority.

Special Case. Declaration: 1st count, for not levying on the goods of Silas Burnham, and returning nulla bona; 2nd count, for levying the monies and not paying over, and falsely returning "nulla bona." Pleas: 1st, not guilty; 2nd, there were no goods within his district; 3rd, did not seize or take in execution, nor make the monies. The facts of the case were—that on the 18th March, 1843, the plaintiffs placed several bills in their solicitor's hands for suit against Silas Burnham. On the 25th March a ca. re. was issued to the sheriff of the Home District, and given to the sheriff on the same day, which was served by a bailiff, and on the 19th June was returned, and an appearance entered on the same day by *George Duggan* as defendant's attorney. The declaration was filed on the 21st and served on the 26th June, and on the 4th of July interlocutory judgment, for want of a plea, was signed, and a summons to compute thereon issued, returnable the following day, when an order to compute was granted; and under it, on 6th July, final judgment was signed, and an execution against goods issued to the sheriff of the Home District; and when it was placed in the sheriff's hands, a notice was served upon him, that the plaintiffs would insist on their priority over an execution against Burnham, in favour of Bernard and Co. On the 19th

August, after being ruled, the sheriff returns the fi. fa. "nulla bona." Prior to the fi. fa. in this cause issuing, and before any other writ issued, a fi. fa. of Zaccheus Burnham against Silas Burnham issued, indorsed to levy £1,200, under which the sheriff returned—that he had made £900, and that Silas Burnham had paid the remaining £300 to the plaintiff Zaccheus Burnham, and resisted successfully an application to pay over a greater sum than £900 on that execution. Under that execution goods to the following amount were levied upon:—

Proceeds of sales	£1300
To Bernard and Co.'s writ, a return goods on hand ...	300
An iron safe	60
<hr/>	
Making altogether	£1660
<hr/>	

in the sheriffs' hands: out of this sum was paid—

Zaccheus Burnham's fi. fa.	£945
To landlord for rent	60
<hr/>	
	£1005
<hr/>	

Leaving a balance of £645 still in the sheriff's hands. On the 2nd March, 1843, Silas Burnham executed a warrant of attorney to confess judgment in favor of Bernard and Curtis, upon default in payment of the instalments of the penal sum of £3600; on which warrant of attorney, on the 15th June, 1843, judgment by nil dicit was entered, and execution issued for £491. 10s. 9d., and about the same date placed in the defendant's hands (as sheriff) to be executed, which fi. fa. was returned, goods on hands to £300, and nulla bona as to the residue; no attachment or process of any kind preceded this latter judgment. On or about the 19th May, 1843, Silas Burnham absconded, and various attachments were immediately issued, under the Absconding Debtors' Act, against his property, real and personal, for several thousands of pounds. The question for the decision of the court was, whether on this statement of facts the plaintiffs were entitled to recover in this action against the sheriff.

Crooks, for plaintiffs.

Baldwin and Blake, for defendant.

ROBINSON, C. J.—I think it clear on the facts of this case, that the plaintiffs having sued out process and served it on the debtor before he absconded, are entitled to priority before the attaching creditors. If there was no question but between them and Bernard & Curtis, then clearly, as the latter obtained judgment first, they would have a claim to be first satisfied, but they cannot be satisfied till all the attaching creditors are paid. On that point the Absconding Debtors' Acts are clear. It follows, that no decision can take place as between these two parties in respect to their right of being satisfied out of the defendant's assets, until the suits of the attaching creditors are carried to judgment, or at least till reasonable time has elapsed for their obtaining judgment. If their debts should cover more than the amount of assets, then Bernard and Curtis can never get anything. These plaintiffs will have to be first satisfied, and the attaching creditors will share the residue among them. It is repugnant to reason to say, that the attachments have priority over

Bernard and Curtis' execution, and that these plaintiffs have a prior right over all the attachments, and yet that they have not priority over Bernard and Curtis, even while the suits on the attachments are pending. Bernard and Curtis can get nothing till all the attachments are satisfied. We must wait till we can see whether they can in the end have a claim to anything. If the attachments are followed up by judgments sufficient to intercept any chance of Bernard and Curtis being satisfied, then there can be no reason why the plaintiffs should not be allowed to have their execution satisfied, whether there may or may not be any surplus for the attaching creditors. In this stage, therefore, of the proceedings against the absconding debtor, we cannot overlook the effect of the attachments, and of the prior execution at suit of Bernard and Curtis, and suffer these plaintiffs to recover against the sheriff for a false return, as if the question lay merely between them and the attaching creditors, and as if Bernard and Curtis were to be certainly and at all events postponed. This applies to the question generally; but upon the evidence it does seem to me, that as regards the value of the safe, we cannot say that the plaintiffs have brought their action prematurely. The sheriff had seized that with the other goods upon the f. fa., at suit of Zaccheus Burnham, which was clearly entitled to priority over all. Not receiving an adequate bid for it, he abstained from selling it; and that f. fa. was discharged from the proceeds of the other goods. The safe then remained liable to the attachments which had been placed in the sheriff's hands. It could not have been properly seized upon the f. fa. of Bernard & Curtis, because it was in the custody of the law upon those attachments. Moreover, *it was not*, in fact, seized upon that writ; the return to that writ was, that the sheriff had made £300 upon it, and as to the residue, nulla bona. The £300 was proved to have been a sum of money remaining in the sheriff's hands, of the proceeds of the goods which he had sold under Z. Burnham's writ, and which money, whether correctly or not, he conceived he could apply, and intended to apply (as a surplus in his hands), upon the f. fa. of Bernard and Curtis. That return being made to it, and the return day being past, the f. fa., at the suit of the plaintiffs in this action issued; and it is quite clear, that this safe, which is sworn to be worth about £60, might under these circumstances have been seized, and therefore ought to have been seized to satisfy their writ. The attachments could not prevent it, because the plaintiffs, having served their process on the debtor before he absconded, and having got judgment under execution before any attaching creditor, are secured in their priority by the 4th clause of the 5th Wm. IV. ch. 5. And the f. fa. at suit of Bernard and Curtis could not prevent it, because that was past the return, and could not attach at that moment upon the goods. There is no reason whatever, therefore, why the plaintiffs should not have judgment for the value of the safe, because the sheriff might and ought to have seized it upon their writ, and therefore the return of nulla bona was in fact false.

KERBY v. LAWRENCE.

An offer in writing to purchase lands, stating the terms, and an acceptance of that offer also in writing, is a sufficient contract in writing respecting an interest on lands under the Statute of Frauds.

The plaintiff sues in assumpsit on a special agreement. The 1st count states, that in consideration that the plaintiff would bargain and sell to

the defendant a certain farm of the plaintiff's, being, &c., the defendant promised to pay for the same 200*l.*, by instalments in the manner stated; that the plaintiff did bargain and sell the land accordingly to the defendant; and that although the defendant did pay 25*l.* on, &c., being the first instalment according to the agreement, yet that afterwards 125*l.* with interest became due, and is still unpaid, and that the defendant would not pay the same according to his promise. In two other counts the agreement is declared on with variations as to the times of payment. There are no common counts. The defendant pleads to the first count—that there was no agreement in writing for the sale of the lands mentioned; to the 2nd and 3rd counts—the general issue. The plaintiff replies that the agreement in the first count mentioned was made in writing. A non-suit was moved at the trial, on the ground that there was no memorandum in writing as required by the Statute of Frauds. The learned judge directed a verdict for the plaintiff for the sum due, 158*l.* 6*s.* 8*d.* reserving leave to the defendant to move for a non-suit on this ground. A rule nisi was obtained accordingly.

Meyers, counsel for plaintiff.

Vankoughnet, counsel for defendant.

ROBINSON, C. J.—At the trial it was proved that the defendant proposed in writing on the 24th December, 1839, as follows: "I propose to buy Mr. Kerby's land as follows: say for 200*l.*—25*l.* payable the 20th April next, 50*l.* in 1840, the remainder payable 25*l.* per annum. 1st Jan. 1839. If I can have the place as above stated you can leave me a line to that effect at G. McGrath's, &c. Carrying Place, 24th December, 1838. [Signed] George Lawrence." This letter was addressed to Mr. Wilkins, the plaintiff's agent. On the 7th January, 1839, Mr. Wilkins, at the defendant's request, wrote to the plaintiff communicating this offer, and advising him to accept it. In this letter all the instalments are stated as proposed to be made payable on the 1st April (not on the 20th), which is not the case. I see nothing in writing signed by the defendant binding him to pay money on any other day than the 20th April. The number of the lot is not mentioned in the proposal, or in this letter. In the latter it is called "your land and premises at the Carrying Place." On the other side of the page of Mr. Wilkins' letter to the plaintiff, there is written a memorandum, that he had written to Wilkins confirming the sale of the lot and house in the Carrying Place, one hundred acres, and would give him a bond for a deed on his making the payments as therein set down, which agrees with the statement of the bargain in the first count of the declaration. This is signed by the plaintiff. On the 3rd July, 1839, the plaintiff executed a bond to the defendant, which was proved at the trial, which recites such an agreement as is stated in the 2nd and 3rd counts, viz.—that he had agreed to sell to the defendant Lot 6, on the North-West side of the Carrying Place, in the township of Murray, one hundred acres, for 200*l.* with interest from 1st January, 1839; paying 25*l.* with interest on signing the bond, 50*l.* on 1st May, 1840, and so on with the other instalments, and binding himself to make a good title on these monies being paid. The defendant was proved to have gone into possession, and is still on the place, or his tenant, and he paid the first sum of 25*l.* I am of opinion, that the requisitions of the statute are in this case complied with. The letter of Mr. Wilkins is the

letter of the defendant's agent, and the signature of the agent is sufficient under the statute; so also would be the signature even of the agent's clerk. Then we have here an offer of the defendant in writing, signed by his agent, to purchase on such terms as are set out in the first count, and we have the plaintiff's acceptance of those terms, signed by himself. This completed the contract in writing, signed by the party charged in this action. It is true the plaintiff's bond, which was in evidence at the trial, recites that the instalments were made payable on other days, namely—on the 1st of August in each year, but that we must take upon the other evidence to be an erroneous recital which vitiates nothing. The defendant cannot evade evidence of a contract which does bind him in writing under the statute, by relying upon that which as it regards him is no proof of a contract respecting an interest in lands, because not signed by him. We cannot take the recital in the bond signed by the vendor as evidence, only for the purpose of defeating his action; and if we could receive it as proof of the fact recited, then it would support the agreement as laid in another count. I take this to be a case in which a written memorandum was necessary (*a*); but the papers in evidence, in my opinion, supply it.

Rule discharged.

DOE DEM. MCBERNIE v. LUNDY.

An action of ejectment cannot be sustained by a mortgagor to recover possession of the mortgaged premises against a stranger, where the mortgage is overdue and unsatisfied, the fee and right to possession being in the mortgagee. The court will not grant a new trial to enable a mortgagor, being lessor of the plaintiff in ejectment, to shew his own deed void for usury, and thus eject a stranger who sets up as a defence a mortgage to a third party for the premises in question.

Ejectment for a small strip of land, in the town of Peterboro', described as being four-and-a-half inches in width in front, on George street, by nine inches in rear, and one chain seventy links in depth, claimed by lessor of plaintiff as part of Lot No. 6, and by defendant as part of Lot No. 7, West of George Street. The verdict is for defendant; and plaintiff moves on affidavits to set the verdict aside.

ROBINSON, C. J.—The dispute at the trial was about a few inches of land, of which defendant, as owner of Lot 7, had been long in possession, his building covering the small strip claimed. The evidence given by surveyors seemed to prove that an accurate survey would make out defendant's house and fence to encroach about six inches on the plaintiff's lot, No. 6. But the defendant resisted plaintiff's recovering, by proving that he was not seised of the legal estate, having executed a mortgage in fee, on 21st July, 1841, to George Brown, of the *land coming up to No. 7*, (defendant's lot), in order to secure a debt of 50*l.* Plaintiff proved that Brown had extended the time of payment to July, 1844. The learned judge ruled that plaintiff could not recover, the fee being in the mortgagee. Now the lessor of the plaintiff moves to set aside this verdict upon an affidavit of himself and of one John Brown the subscribing witness to the mortgage, that the 50*l.* secured by the mortgage was money lent to McBernie by George Brown, the mortgagee, upon usurious interest.—viz. at eight per cent., and that the 50*l.* was afterwards actually repaid with

(*a*) *Mayfield v. Wadsley*, 3 B. & C. 364.

interest at eight per cent. from the time of the loan. The defendant, on the other hand, files affidavits, tending to shew that at the time of the trial the mortgage was not in fact satisfied ; the contrary is not shewn on the other side ; and indeed it is not to be supposed that it was, for the parties had by a written agreement extended the time for payment till July, 1844, which is not yet arrived. We are of opinion, that this rule should be discharged. The plaintiff sues in ejectment for a few inches of land, of which defendant has been long in possession. Which has the right to it is a nice question of boundary, which was not, in the opinion of the learned judge at the trial, conclusively made out in favour of the plaintiff; but, independently of this, it was shewn, that plaintiff at the time of the demise stated was not seised, having conveyed the estate to one George Brown, not absolutely, but by way of mortgage ; but that it is the same thing, for the fee equally passed ; and at the time of the demise laid, the mortgagee, not the mortgagor, was entitled to the possession, and there is no doubt this was not a satisfied mortgage. As to the alleged usury, we shall certainly not grant a new trial in order to enable a party to turn another out of possession, by shewing that a deed made by himself was void for usury. If that will entitle the plaintiff to gain possession, on a demise such as is laid in this record, he may bring a new ejectment.

Rule discharged.

PONTON v. DALY.

A judgment in ejectment against the casual ejector, does not estop a defendant in an action for mesne profits, from disputing the title of the plaintiff from the time of the demise laid in the action of ejectment.

Trespass for mesne profits. Pleas, general issue ; second, locus in quo not the close of the plaintiff. At the trial, defendant desired to prove that the locus in quo was part of lot nine, and not part of eight, which latter lot belonged to plaintiff. Plaintiff contended that having recovered in ejectment lot number eight in the eighth concession, on a judgment against the casual ejector, such recovery estops the defendant from disputing his right from the time of demise laid, 4th August, 1843. The learned judge thought it was not an estoppel, and after hearing the evidence, the jury concluded that the premises are part of lot nine, and not of eight, and found for defendant. Plaintiff moves for a new trial, on the law and evidence, and for the admission of improper evidence. It was proved at the trial, that when the sheriff went to execute the habere facias in the ejectment case, he found defendant occupying part of what plaintiff claims as lot eight, and removed him from it.

Ross, counsel for plaintiff.

Crawford, counsel for defendant.

ROBINSON, C. J.—The whole question is, whether the judgment in ejectment was conclusive or not. It is reported by the learned judge, that plaintiff was not prepared to go into proof of the boundary lines, conceiving that the recovery in ejectment would be conclusive in his favor. The evidence which was given was conflicting. It was left to the jury to determine whether the locus in quo was part of nine or eight, and they found it to be part of nine, and so found for the defendant. If the judgment in the action of ejectment was conclusive as an estoppel, then of course the plaintiff should have a new trial. Formerly it was held to be

so, and as well when the tenant did not defend, as after a trial of the title. But doubts have been from time to time intimated upon the point whether it could be an estoppel, when the defendant in the subsequent action for mesne profits denied the plaintiff's title, as he has done here, and when consequently the issue is expressly upon that fact. This has not been pleaded as an estoppel, and after the mature consideration which this point underwent, and the elaborate judgment given by the court of Exchequer in a precisely similar case (*a*), we do not consider that we can properly do otherwise than abide by that judgment, and discharge this rule; or we shall have one course of proceeding in England on this point, and another here, which would lead to inconvenience.

Rule discharged.

BECKETT v. URQUHART.

A warehouseman receiving goods to forward, discharges his undertaking and consequent liability by delivering them properly directed to the master of a steamer or other vessel, on board of his vessel, engaged in the carrying trade between the place at which the goods were received and the place to which they are to be forwarded. And averring in the declaration that he received the goods *to be forwarded* by him, does not charge him as a common carrier.

Plaintiff sues in assumpsit, stating that in consideration that plaintiff, at request of defendant, then being a wharfinger and forwarding merchant, had caused to be delivered to him certain goods of the plaintiff, to be by defendant forwarded from the city of Toronto to Montreal, to be there delivered to Messrs. Carter and Company, for the said plaintiff, for reward to the defendant in that behalf, he (defendant) undertook to forward such goods and chattels to Montreal, aforesaid, to be delivered for the said plaintiff to the said Messrs. Carter and Company. He then averred that defendant, not regarding his promise, did not, nor would forward the said goods for the plaintiff to Montreal, to be delivered to, &c., but that defendant, being such forwarding merchant as aforesaid, wholly neglected and refused so to do, and wrongfully detained the same without forwarding them as aforesaid, and afterwards they were wholly lost through the carelessness and negligence of defendant, and never were delivered, &c. In a second count, plaintiff declared as in the first respecting the delivery of the goods to be forwarded, and their not being forwarded, and their loss, and then averred that plaintiff and defendant submitted to two persons, named, to determine whether plaintiff had a claim on defendant for the value of the goods, and that defendant promised to pay the value if the arbitrators decided that he should. It then sets out a decision that he should pay, and defendant's refusal. Defendant pleads, first, that he did not promise as alleged in the declaration; secondly, that he did not submit, &c. as in the second count alleged; thirdly, that the referees did not so decide. Plaintiff had a verdict for 22*l.* 4*s.* 6*d.* damages, and defendant moves for a new trial, for misdirection, or on the merits, with leave to plead performance of the contract set out in the declaration, or why verdict should not be reduced to nominal damages according to leave reserved at the trial. It appeared that on 24th October, 1842, defendant gave to plaintiff this receipt for the goods in question: "Toronto, 24th

October, 1842.—Received in good order from Joseph Beckett & Co., on board the steamer Niagara, one case, addressed to Messrs. John Carter & Co., Montreal, care of Messrs. McPherson & Crane." And the question that arose at the trial was, whether this receipt, with the other evidence, amounted to proof of such an undertaking as was declared upon. It was contended that it did not, for that the contract set out was a contract to carry the box to Montreal, whereas, what was shewn was, that the defendant was a warehouse-keeper and wharfinger only, who, in the common course of his business, had merely received the box for the purpose of forwarding it through some one of the common carriers on the lake to Montreal.

Cameron, counsel for plaintiff.

Crooks, counsel for defendant.

ROBINSON, C. J.—In my opinion the declaration charges nothing more than an undertaking to forward, that is to put in *itinere*, not to carry, and therefore the evidence did, as I think, sustain the assumption stated, and the defendant, not having pleaded performance, but having merely denied the undertaking, it followed that the plaintiff was entitled to recover. But it is equally clear, upon the facts proved and the arguments on both sides, that there was in truth no pretence for charging the defendant with the loss of the box. The declaration only charges, as I conceive, an undertaking to forward, to be delivered at Montreal, or in other words, to forward to Montreal—not to carry; and it was shewn, and is not disputed, that the defendant did perform his duty, if his undertaking went no further, for he did deliver the box, properly directed, to the master of a steamer on board of his vessel engaged in the carrying trade between this and Montreal. By that delivery he was acquitted; and what would make it absurd as well as unjust that this defendant, the forwarder, should be held liable for the non-delivery of the box, is, that this plaintiff has brought an action also against the master of the steamer for negligence, and failed in that action, upon proof that the parcel was in fact delivered to the intermediate forwarder at Kingston, to whose care it was addressed. (Constructively delivered, at least, by notice of its arrival being given to their clerk.) That the plaintiff has, notwithstanding, been suffered to recover a verdict against this defendant at the trial, was owing, first, to the circumstance that the defendant's attorney misconceived the extent of the contract charged in the declaration, and therefore denied it, assuming that he was charged as a common carrier, and meaning to contend that he had only engaged to forward the box to be carried by others; whereas, the declaration does really not charge any thing more than an undertaking to forward; of which undertaking the defendant should have pleaded performance, and could have proved it. Under these circumstances—I think the verdict should be reduced to nominal damages, according to the leave reserved at the trial.

MCLEAN, TREASURER, &c. v. SHAVER ET AL.

A bond given to the treasurer of a district by a collector of township rates, after the passing of the statute 6 Wm. IV, ch. 2, and before the repeal of the statute 5 Wm. IV, ch. 8, may be sued upon and a good breach assigned, in not paying over monies collected for arrears of rates due five years preceding that for

which such collector was chosen to act, though the condition that he would collect such rates would not be binding after it had been made his duty by law to collect only those of the current year.

Action on a bond in the penalty of 400*l.*, given by the defendants, jointly, to plaintiff as treasurer of the Eastern District, conditioned for the collection, by Shaver, one of the defendants, of all the rates and assessments of the township of Matilda, for the year preceding the first Monday in January of the year in which the bond was executed, and for the payment of all monies which he may so collect, to the treasurer of the district. The defendants, after craving oyer of the bond and condition, demur and assign for cause, that the condition of the bond in the declaration is not according to law, and the form prescribed by statute 6 Wm. IV, ch. 2, sec. 5, and that therefore the bond was void.

J. H. Cameron, counsel for plaintiff.

Vankoughnet, counsel for defendants.

ROBINSON, C. J.—This bond, it appears, was taken after the statute 6 Wm. IV, ch. 2 had been passed, but before the statute 5 Wm. IV, ch. 8, was repealed. It is not such a bond as the statute 6 Wm. IV, ch. 2, requires to be given for securing the performance of a collector's ordinary duties, which is for the collection of the rates for the year in which he is to serve. But that act, though it made this change,—that the collector thereafter was to collect the rates for the current year and not for the preceding year, which had been his ordinary duty by the statute 5 Wm. IV, ch. 8, did yet not repeal the 27th section of the statute 5 Wm. IV, ch. 8, which empowered the collector to collect any arrears of rates that might remain unpaid for any previous years. That clause upon which this bond was given was still in force therefore, when this bond was made, and if it had not been, still we should find it difficult to say that the collector might not properly collect, or at least receive, any such old arrears of rates from persons desirous of paying them. And though it is not enacted by the statute 6 Wm. IV, ch. 2, that he shall give a bond to secure the due payment over of any such rates, we cannot hold that such a bond, being given by him, is illegal and void. It is prohibited by no law. So far as binding himself to collect the rates for the preceding year, it might be a void condition, for that may be now no part of his duty, but a good breach might be assigned on this bond, in not paying over any arrears of rates which he has collected; therefore, we cannot say that an action on the bond cannot lie.

WADSWORTH v. MURPHY.

A party who, acting as a revenue officer or conceiving that he has authority so to act, seizes goods, is entitled to notice before action brought, without the necessity of proving his commission or appointment.

Plaintiff sues in trespass for taking a box of tea, value 20*l.*; defendant pleads general issue by statute. It was proved on the part of the plaintiff, that in March, 1843, defendant had seized a box of tea, at a tavern on the road up the Ottawa, which plaintiff's teamster was conveying with other goods from Bytown to plaintiff's shanty. It was further proved, that this tea was seized by defendant upon the ground alleged by him—that it was smuggled; but that the tea had in fact been bought in Bytown.

of a merchant there; and evidence was given that it was tea imported by a respectable house from England through Montreal. It was not positively proved to have come from England, but the witness swore to his belief that it had. On defendant's part it was offered to be proved, that defendant was a custom-house officer—a deputy collector; and a deputation was produced, which he was said to have held from Duncan Fraser, Esq., formerly collector of customs at Brockville, but who was no longer an officer of customs when this tea was seized: moreover, there was a subscribing witness to the deputation, and he was neither called nor accounted for. The defendant contended, that his having acted in the capacity of a revenue officer was sufficient, without any proof of a commission or deputation; and he desired to call witnesses to prove that defendant had been acting as a custom-house officer, and also to prove that the tea had been in fact condemned by the commissioners of customs at Brockville. The learned judge thought the evidence of these facts would not be material, without shewing that defendant really was an officer of customs at the time; and he directed a verdict for plaintiff. The jury gave 9*l.* damages. Defendant now moves to set aside this verdict, on the ground of legal evidence having been rejected.

Sherwood, counsel for plaintiff.

Hervey, counsel for defendant.

ROBINSON, C. J.—We are of opinion that this rule must be made absolute. If the defendant was acting as a revenue officer, or even supposed that he had legal authority so to act, the cases are strong to shew that he would be entitled to notice without any necessity of proving his commission or appointment; and if the tea was condemned upon the seizure made by him, it might have been natural for him to shew.

Rule absolute.

MANNERS v. CLARK.

The court will order an attachment to issue against a party who files a bill in equity, contrary to his undertaking in a rule of reference, and in disregard of a rule of court made thereon.

Motion for attachment against defendant, for a contempt in filing a bill in equity, contrary to defendant's undertaking in the rule of reference, and in disregard of the rule of this court made thereon in this cause. At the assizes in Cobourg, in September, 1843, this cause was referred to arbitration, and verdict for plaintiff taken by consent for 250*l.*, subject to be reduced,—award made 2nd October in favour of plaintiff, directing verdict to stand for 152*l.* 4*s.* 16th November last, the rule of reference was made a rule of court, and costs taxed at 66*l.* 8*s.* 2*d.* On 17th November, while verdict and costs were unpaid, defendant made affidavit before a master to obtain injunction to stay proceedings at law, on the award. An injunction was obtained, and served 4th December. The injunction issued 25th November, 1843, and restrains defendant from issuing execution on the judgment, or taking any proceedings at law on the award. The consent in the rule is, "that neither plaintiff nor defendant shall prosecute or bring any action or suit in any court of law or equity against the arbitrators, nor bring nor prefer any bill in equity

against each other, of and concerning the premises in question so as aforesaid referred."

Crooks, counsel for plaintiff.

Cameron, counsel for defendant.

ROBINSON, C. J.—We are of opinion that the attachment should go. The submission was made a rule of court on the 16th November, 1843, and the injunction was sued out afterwards, that is, on the 25th November, so that in fact the defendant was proceeding in equity in contempt of a rule of the court which had actually been made; and the objection (if it was any) that the submission was not made a rule of court till afterwards, was founded in a misapprehension of the facts. There is no need to rely upon the principle that the rule of court when made would extend back by relation, in its effect, to the time of the submission. It would have been well if the bill in equity had been shewn to us, in order that we might see on what pretence and for what purpose, or rather under the pressure of what supposed necessity, the defendant adopted the proceeding complained of. But without having these before us, and not prejudging whatever excuse the defendant may hereafter advance, his proceeding in equity is in apparent violation of his undertaking, and a contempt of the rule of court made upon it, and therefore the attachment should go. If he shews, when called on to answer interrogatories, any thing to excuse him, he may be discharged on such terms as shall seem proper. When the submission has been by bond under the statute 9 & 10 Wm. III, and has been made a rule of any other court, then it is quite clear that the Court of Chancery cannot interpose, because the statute in express terms prevents it, and confines ulterior proceedings to the court in which the submission has been acted upon. But where, as in this case, the submission is by rule of reference at nisi prius, a court of equity may, if it will, entertain an application for setting aside the award; leaving the party making such application amenable to the court of Queen's Bench, if he violates the terms of his submission entered into in that court, by filing a bill in equity. I find nothing in any of the cases cited to shew that the defendant could file a bill in equity in this case, without incurring the penalty of a contempt. The case of *Wilton v. Hopewood* (*a*) bears strongly against such a proceeding.

Attachment ordered.

CITY BANK *v.* LEY.

In an action on a promissory note drawn and payable in Lower Canada, the law of Lower Canada must govern in regard to the sufficiency of the notice of non-payment by the maker to charge the indorser.

Assumpsit against indorser of a note. Defendant denies that he had notice of non-payment by the maker. The note was made in Montreal 4th July, 1842, for 411*l.* 15*s.*, payable in three months to defendant or order. A protest was put in by a notary of Lower Canada, certifying that he presented the note on the 8th of October; and at the foot he adds, that he had sent a copy of the protest to Ley "by sending the same to his address at Toronto."

Hagarty, counsel for plaintiff.

Bell, counsel for defendant.

ROBINSON, C. J.—It is admitted in writing, by counsel on both sides, that the notice was mailed in Montreal, addressed to Toronto, on 11th of October, 1842, and a copy of the statute of Lower Canada, regulating protests and notices of notes and bills, is laid before us, as being in evidence at the trial. That statute, passed in 1794, requires that a note shall be presented after the third and before the expiration of the sixth day after the same shall have become due, and that notice of non-payment and protest shall be sent to such indorser or indorsers, or to the usual place or places of his, her, or their residence, within ten days, if not more than ten leagues distant, and if more distant, one day for every five leagues. A new trial has been moved for on the ground that legal notice to indorser was not proved. We are of opinion that upon this note it is the law of Lower Canada that must govern in regard to the sufficiency of the notice to charge the indorser, and that all was done here which the statute of Lower Canada requires, both as to the time of presenting the note and giving notice to the indorser, and also as to the description of notice. If we were to require more to be done upon a transaction of this kind occurring in Lower Canada, we apprehend we should be creating great loss and uncertainty in mercantile transactions. Undoubtedly the law of England requires (at least has been hitherto held to require), that the notice should express that it is sent at the request of the holder, who looks to the indorser for payment; but the statute of Lower Canada makes only a mere notice of presentment and non-payment necessary, and it is proved in the usual manner, and is besides admitted that such a notice was sent by mail, on a certain day, which is within the period allowed by the statute-law of Lower Canada.

THE QUEEN, IN THE PROSECUTION OF GEORGE T. DENISON, v. THE
COMMISSIONERS OF THE TURNPIKE TRUST, AND ALSO AGAINST JAMES
YOUNG, CLERK TO THE TRUSTEES OF THE YONGE STREET ROAD.

Where proceedings have been taken, and damages awarded, under the provincial act 4 & 5 Vic. ch. 63, the Court of Queen's Bench will not order the proceedings shewn on the return to a writ of certiorari to be quashed, on the ground of mere informality;—to set them aside, the court must see that substantial justice between the parties has not been done.

In this case the court was moved, on affidavits, to issue a mandamus for compelling the commissioners of the Turnpike Trust to pay to George T. Denison 275*l.*, being the amount awarded by a jury at the Court of General Quarter Sessions, to be paid to him on account of damage done to his property on Yonge Street by the making of the macadamized road, upon a proceeding had under the provincial statute 4 & 5 Vic. ch. 63. And the court having granted a writ of certiorari, to remove the proceedings into this court, a motion was made, on behalf of the commissioners, to quash the proceedings returned upon the writ.

H. J. Boulton, counsel for commissioners.

Sherwood, counsel for defendant.

ROBINSON, C. J.—This seems, by what is shewn to us, to be a case in which, since the passing of the statute 4 & 5 Vic. ch. 63, a claim has been laid before a jury at the court of quarter sessions, under the provisions of that act, for damages alleged to be done to the property of Mr. Denison,

on Yonge Street, in the course of making a macadamized road; and the jury have awarded damages to the party. Nothing, certainly, could well be less formal than the proceedings laid before us as the return to the writ of certiorari. But we see nothing that should lead us to quash these proceedings. It is not to be assumed that what is done under these statutes by compensation juries, as they are called in the English courts, is to be scrutinized in the same spirit and with the same view as summary convictions for offences. Those latter are proceedings *in invitum*,—they are entrenchments upon the common law, and upon the trial by jury,—and being in the strictest sense penal proceedings, the utmost regularity is required in them. But these assessments of damages or estimates of value of land taken for public purposes, are made by juries under statutes intended to afford a convenient and adequate remedy to individuals, for trespasses committed on their rights in the prosecution of some public enterprise authorized by the legislature. We are to look at them with a liberal desire to uphold them—unless some ground is laid for believing that substantial justice has not been done, in consequence of some provision of the statute having been disregarded. The cases of *The Queen v. The Manchester and Leeds Railway Company (a)*, of *The Queen v. The Committeemen of the South Holland Drainage (b)*, and of *The Queen v. The Trustees of Swansea Harbour (c)*, are all strong to shew, that for anything that has been shewn to us, this certiorari ought not to have gone. We see, and it is not denied, that both the commissioners and the claimant were before the jury, and called many witnesses upon the subject of the claim. Our statute does not, like the British statutes in general, require a notice to be served as the foundation of the proceedings; it simply provides "That the amount of compensation shall be decided by a jury of the district, at the court of quarter sessions, to be empanelled and sworn for that purpose, at the request of the party entitled to compensation, and that the amount of compensation assessed shall be paid by the commissioners of the District Turnpike Trust, out of any monies in their hands applicable to the purposes of the act." No form is required, no record directed to be made. We are not called upon, and ought not, to stand in the way of the party receiving the compensation which may be assessed for him, by exacting formalities which the law does not require. Undoubtedly we must be satisfied that both parties had in fact notice of the proceedings and were fairly heard. And when both the commissioners and the claimant were before the jury and produced their witnesses, we need inquire no farther on that head. I apprehend the writ was ordered in the Practice Court, under the impression that the issuing it was merely a matter of course, but it is clearly otherwise. In *The Queen v. The Manchester and Leeds Railway Company (a)*, Lord Denman says in a case of this description, "It is clear that we must exercise a discretion as to granting a certiorari. Here it does not appear that the party applying has been injured by either of the defects to which he objects, nor that he had not in fact full notice, nor that he was misled; he went to the inquisition, he was fully heard by counsel, but he is disappointed by the amount eventually awarded." The same may be said in the case before us, except that it is the commissioners

(a) 8 Ad. & Ell. 426. (b) *Ibid*, 437. (c) *Ibid*, 439. (d) *Ibid*, 426.

who move against the proceedings, not the individual claiming compensation. The judgment of the court in *The Queen v. Trustees of Swansea Harbour* (*b*), is also strongly against the granting these proceedings, and particularly what is said by Mr. Justice Littledale in that judgment. No statute certainly can have exacted less to be done in point of form for fixing the compensation, than the statute upon which the proceedings took place. It is the most simple provision that could possibly have been made, and if there is any reason which should prevent the verdict from being carried into effect, it certainly is not before us on affidavit, and it ought to be a substantial objection such as would compel us to say that injustice had been done. If there is in fact any such reason, it can yet be shewn as a ground for not paying the money, by way of return to the mandamus prayed. We are of opinion that the proceedings should be remanded to the court of quarter sessions, and that a mandamus must go directing the trustees to pay the money, or shew cause to the contrary.

DOE DEM. YOUNG *v.* SMITH.

The sale of lands by a sheriff under a *fi. fa.*, five years after the sheriff who sold had left his office, where there had been no seizure or advertisement of sale during the currency of the writ, no continuance of proceeding under it, and no assent of the parties to the delay, cannot be upheld.—*QUÆRE?* Would such a sale be valid even though the sheriff had continued in office up to the period of sale.

Ejectment for lands in the town of Hamilton. Verdict for plaintiff. New trial moved for misdirection and on affidavits, or for non-suit on leave reserved. The plaintiff made title under a sheriff's deed, upon a sale under execution against one Wm. B. Sheldon. The defendant objected to the legality of the sale and conveyance under the circumstances, and he also set up a title in himself under a deed from Sheldon, the debtor. This conveyance was impeached as being made fraudulently, without consideration, and to defeat creditors. The defendant, before he opened his own title, had taken several objections to the sufficiency of the plaintiff's title, and the first question was, whether, having been shewn to be holding under a fraudulent assignment, he could nevertheless put the plaintiff to the proof of a strictly legal title. There had been several judgments entered in the Queen's Bench against Sheldon, under which, or some one or more of them, the plaintiff attempted to support the sale in execution, and the sheriff's deed, but it seemed impossible, upon the evidence, to rest upon any of them unless upon a judgment at the suit of Strange, entered 25th April, 1835. The writ against lands on this judgment was returnable in Trinity Term, 1836. In that year, but after the return of the writ, the sheriff (Jarvis) to whom it was delivered, went out of office. He had several times before, and in 1839, exposed this land to sale, but the sales had proved ineffectual, though the land was bid off, and on 26th of July, 1841, five years after the sheriff was out of office, he put up those premises again to sale, and they were bid off to the lessor of the plaintiff, for 157*l*. Upon this sale the late sheriff made a deed to lessor of the plaintiff dated (perhaps erroneously) 9th July, 1841, reciting several executions, and among them Strange's, as those on

which he had sold the property. It is not stated in the evidence that any act was clearly shewn to have been done by the sheriff indicating a seizure on Strange's execution, before he had ceased to be sheriff, but in the deed given by the late sheriff, in July, 1841, upon the sale made by him in that month, and five years after he had ceased to be sheriff, it is recited, that *by virtue of this writ of Strange's*, and other writs set forth in it, and directed to him as being then sheriff, he had seized and taken (not saying when) "these premises now in question, which premises, since the seizure *by him made by virtue of the said writs*, after due notice were exposed to public sale on the 28th July, 1841, and bid off by John Young, the lessor of the plaintiff, for 157*l.*"

H. J. Boulton, counsel for plaintiff.

J. H. Cameron, counsel for defendant.

ROBINSON, C. J.—The court is of opinion that upon the facts proved the plaintiff was not entitled to recover, and that a non-suit should be entered. There is no doubt that when a sheriff has made a seizure under a writ of *fi. fa.*, he may complete the execution which he has thus begun, by selling the property, although he has in the mean time gone out of office. There are many cases deciding that point. They relate however, it must be observed, only to the seizure of goods, and the principles on which they have been determined are stated at large in the case of *Clerk v. Withers (a)*, where the court say "The sheriff, when he seizes the goods, gets a property in them against all persons, and may have trespass against the true owner if he should retake them." By seizing he renders himself chargeable with the value of the goods, and it is therefore fit and necessary that he should have the power to sell them, in order to complete what he has begun, and relieve himself from the charge which he has incurred by the act of seizing. If he neglects to sell, a *distringas* goes to the new sheriff to compel him; but the old sheriff requires no such process to enable him to sell, he is competent to do it without. Now it is obvious that these considerations apply but little, if at all, to the case of a sheriff who has merely had in his hands a writ directing him to sell lands and tenements, and upon which he has done nothing but advertise the property for sale, supposing it to have been proved that Mr. Jarvis, in this case, did advertise the sale before going out of office. There is nothing shewn to have been taken possession of by the former sheriff, no interference with the occupation of the debtor; the premises are allowed to stand just as they always did. Still, I do not say that in such a case the former sheriff ought not, if he had clearly commenced execution, have gone on in the common course and completed it, in the case of lands as well as in the case of goods, for the principle is broadly stated, "that an execution is one entire thing, and where it began it shall end" (*b*), though the reasoning on which the principle is founded seems little applicable to the case of lands. In the case of *Clerk v. Withers*, Powell, J. says, "Execution is an entire thing, and therefore when a sheriff levies goods, and while they remain in his hands for sale a new sheriff is chosen, he who began the execution shall go on with it." So in 2 *Saunders* 47, Note 2, and 2 *Saunders* 345, we see from the *distringas* which in such cases is sometimes issued to the new sheriff to compel his

predecessor to sell, that the goods are stated to be remaining in the hands of the old sheriff for want of buyers. In such a case the new sheriff could not sell what he has not in his hands; and the old sheriff, having by his return fixed himself with the goods, is allowed necessarily to sell them, though out of office. In this case, however, no seizure was shewn to have been made, no return by the former sheriff that he had seized; the land remained after the writ had run out, as if nothing had been done upon it—there was no change of possession, no alteration of circumstances, no reason why another writ should not have been sued out to the new sheriff. The utmost that was pretended to be proved, and I do not see clear evidence of that, is, that some time in 1836, while the *fi. fa.* was current, and not long before the late sheriff went out of office, he had published an advertisement of an intended sale of these lands, under the writ; that after he ceased to be sheriff, he did in fact try on two or three occasions to sell them, but failed, and then, five years after he was out of office, he advertized them again, and actually sold them, to the plaintiff in the suit, who appears to have bid them off at a price very inconsiderable compared to their value. The sheriff, in my opinion, could not at any distance of time take up the execution, at his pleasure, and sell under it, without any assent of the debtor, nor at his instance, nor on any understanding with him; having kept no one in possession in the mean time, and indeed never having put any one in possession. It was not attempted to be shewn that there had been even any regular continuance of postponements on advertisement from time to time, and, for all that was shewn, Mr. Jarvis might as well have taken up the matter suddenly, and sold the premises, after he had been fifteen years out of office, as after the lapse of these five years. Looking at the strong language used by the Court of King's Bench, in *Blades v. Arundell* (*a*), the jury might well, and I think ought to have regarded the seizure under the *fi. fa.*, if any had in truth been ever made under it in 1836, as abandoned before 1841, and that the late sheriff retained no longer a special property in it, nor a right to sell it. It would open the door to great mischief and inconvenience to both plaintiffs and defendants, and to third parties, if, after so long a delay, a sheriff could suddenly take up an execution five years old, and act under it, and in this case the question arises, and is a very natural one, whether if the late sheriff had misapplied the money made on such a sale, so long after he had ceased to hold the office, his sureties under our statute 3 Wm. IV. ch. 8, would have been liable for it. I apprehend clearly they would not, if we consider the 22d section of the act, and the form of the covenant entered into. Independently of all question as between the old and new sheriff, such a sale could not, in my opinion, have been sustained if Mr. Jarvis had continued all the time in office. His having been out of office, however, and for so long a time, makes the case so much stronger against the sale,—that it is impossible to rely upon any recitals contained in the deed given by him in 1841, as evidence of the facts, to the same extent as they might have done if he had been still a public officer, whose official acts and returns could be treated by the court as entitled to credit, till controverted. I am of opinion that the rule for non-suit which has been granted upon the leave reserved at the

(*a*) 1 M. & Sel. 711.

trial, should be made absolute. The circumstances alleged, that the defendant is resting upon a fraudulent assignment of the property, cannot interfere with his right, as being in possession merely, from insisting that the plaintiff shall shew, in substance at least, a good title; and it is a material consideration, on the other hand, that the lessor of the plaintiff, who was the purchaser at the sheriff's sale, the legality of which has been called in question, was the person interested in refusing the *fi. fa.*, having taken an assignment of the judgment. He is not therefore a stranger to the proceeding, and is not entitled to the consideration which strangers, purchasing at sheriff's sale, may in some respects claim, as distinct from the parties to the proceeding.

JONES, J.—I am of opinion that a non-suit should be entered. The sale of a valuable property for a comparatively trifling sum, which has taken place more than five years after the *fi. fa.* was issued, and after the sheriff who sold it had left office, cannot be upheld, where there is no evidence of a seizure or advertisement of sale during the currency of the writ, nor anything to shew a continuance of proceeding under it, nor any assent of the parties to the proceeding. This is a very different case from that of *Doe Harley v. McManus*, in which judgment was given during the present term; nor, in my opinion, would the proceedings have been upheld had the sheriff still remained in office. When a sheriff begins the execution of a writ before he goes out of office he may complete it afterwards, but here there is no evidence of his having acted under the writ while in office and during its currency.

MCLEAN, J., and HAGEMAN, J., concurred.

PRINCIPAL OFFICERS OF HER MAJESTY'S ORDNANCE *v. Johnson*.

The Stat. 7 Vic., ch. 11, sec. 30, enables the Principal Officers of Her Majesty's Ordnance to sue, in their Corporate capacity, for the price of Ordnance Stores, sold by them *before* the passing of the Act.

Declaration is in *indebitatus assumpsit* for goods sold, and goods sold and delivered, and on account stated. Plea, *non assumpsit*. The demand is for the price of ordnance stores, sold at auction at Bytown, to defendant on 4th July, 1843. Plaintiffs had a verdict at the trial for £59 19s. 2d., and leave was reserved to defendant to move to enter non-suit, and, on objections taken at the trial, that these stores were not articles such as could be vested in the officers of the ordnance, under our statute of 1843, ch. 11, not being for the purpose of fortifications or canals; and, secondly, that at the time of the sale these goods were not the property (legally) of the principal officers, the statute not having passed till afterwards, and that they cannot sue except for goods which under the act were theirs. The account (except a few trifling charges) is for 58 cwt. of assorted files. The statute was passed in December, 1843.

Sherwood, Q. C., counsel for plaintiffs.

Hervey, counsel for defendant.

ROBINSON, C. J.—Upon reference to the 30th clause of the statute, we are all of opinion that it entitles and enables these plaintiffs to sue in the corporate capacity conferred on them by the statute, for the price of the ordnance stores sold to the defendant before the act was passed, but yet unpaid for. The monies, when paid, must pass into their hands as

part of the trust committed to them; and the provision contained in the same clause respecting rents due before the act was passed, and contracts made or to be made, shews plainly that the statute was meant to have this operation. It would be imperfect, indeed, if it had not; and it can signify nothing to the defendant, whether he pays her Majesty, or the officers whom the legislature has thus enabled to act for her Majesty in matters of this nature.

Rule discharged.

NICHOLS *v.* MOONEY ET AL.

Where in an action on the case for excessive distress, a count charges the *landlord* with selling the goods for extortionate and illegal charges, such count, being contrary to the provisions of the 1 Vic., ch. 16, sec. 4, cannot be sustained.

Case for excessive distress, with counts for damages occasioned by several irregularities in the distress. Plaintiff recovered against Mooney (the landlord) alone, for distraining for more rent than was due, a verdict of £5 5s. The 6th count charged the defendants with detaining and selling the goods, not only for the arrears of rent and reasonable charges, but also for extortionate and illegal charges. The charge objected to was this item in the bill, furnished by Tucker the bailiff, one of the defendants, of the charges due on the distress: "Keeping possession five days, 18s. 9d." A discussion arose at the trial whether this charge could be legally made under the circumstances; and, as it was a general question of some interest, leave was reserved to plaintiff to move to enter a verdict on the sixth count for 18s 9d., if the court should be of opinion that the charge could legally be made under our statute.

Draper, Q. C., counsel for plaintiff.

Duggan, counsel for defendants.

ROBINSON, C. J.—We do not find that we can properly make this rule absolute, whatever may be our opinion respecting the right to demand the fee charged by the bailiff (for the charge of extortion lies only against the bailiff), who exacted and received the fee, not against the landlord (*a*): motion is to enter a verdict against the landlord *alone* on the 6th count.

Rule discharged.

BANK OF BRITISH NORTH AMERICA *v.* Ross (W.M.)

A letter giving notice of the dishonour of a bill, though from mis-direction it has not reached its destination so soon as it would otherwise have done, is, nevertheless, a sufficient notice, if, being posted sooner than was necessary, it has in fact been received within the period allowed by law for giving notices of dishonour. Where no evidence has been given of a notice of dishonour, and there has been a subsequent unconditional promise to pay, with the knowledge of a default on the part of the holder, the evidence of notice is dispensed with. A promise to pay, after dishonour, and knowledge of laches on the part of the holder, is evidence, as well since as before the new rules, to support the averment in the declaration, that due notice of the dishonour had been given.

Plaintiffs sue in assumpsit, as indorsees of three bills of exchange drawn by Sanderson & Murray, in Kingston, on Murray & Sanderson,

(*a*) See Statute 1 Vic., ch. 16, sec. 4.

of Montreal, in favour of defendant, and by him indorsed to plaintiffs. They aver that the bills were presented on the day they became due, and were not paid, "wherefore the several bills were protested for non-payment," of all which the defendant had due notice, whereby he became liable to pay the said bills, with damages, &c., and in consideration of the premises, he promised to pay, &c. There were three bills, two for 300*l.* each, and one for 200*l.* The defendant pleads to the several counts, that "he had not due notice of the non-payment of the said bill of exchange, as in the count mentioned. At the trial a verdict was rendered for the plaintiffs, with 888*l.* 10*s.* 4*d.* damages. With respect to the first of the 300*l.* bills, the notary public, in Montreal, who presented the same to Murray & Sanderson in Montreal on 16th March, 1843, (the bill having been previously accepted by them) adds to the end of his protest, these words, "And to the end that Sanderson & Murray, as drawers, and Ross & McLeod, as indorsers of the said bill, may not pretend ignorance in the premises, we have served each of them with a certified copy of these presents, *by forwarding the same by mail to their respective addresses.*" The same words were added at the foot of the protest of the other bills. It was proved, at the trial, that the copies of protests of the two last bills were directed to defendant, at Kingston, by the notary, instead of Toronto, where he resided; and that they were, after their receipt at Kingston, correctly addressed, by a clerk in the post office there, and forwarded to Toronto. It did not appear on what day they were received at Toronto, but it was proved, that in consequence of the mis-direction, they must have lost one post at Kingston, and would not have arrived as soon by twenty-four hours, as they otherwise would. These two copies of protests were produced, at the trial, by defendant; the other, which was of the first bill, dated 13th December, and falling due upon 16th March, 1843, the defendant had it not in his power to produce at the trial, and could not shew the same facts as to its mis-direction, for since the trial it has been discovered that the copy of protest was directed, as the others were, to Kingston, by mistake, and that by some accident it got into the possession of Murray, one of the drawers and acceptors, who kept it, and found it, after the trial, among his papers; so that it was in fact never received by defendant, the indorser. The discovery of this new evidence is made one of the grounds of moving for a new trial. On 19th May, 1843, defendant wrote to plaintiffs, or rather to one of their officers, the following letter, viz: "The firm of Ross & McLeod having been dissolved on 1st instant, and as said firm holds itself liable to your bank for certain indorsements of theirs, on the paper of Messrs. Sanderson & Murray, of Montreal, we hereby agree to assume all such liabilities due at this date, and arrange the same with the bank."—Signed, "Ross, Mitchell & Co." After this letter was sent, defendant went to England. In his absence, a partner of his made proposals to the bank, respecting the payment of their notes, which were not accepted, and defendant, on his return, stated that he did not intend to have taken advantage of the errors in giving notice of non-payment if their offer had been acceded to, but as they were rejected, he would. It appeared to the learned judge at the trial, that the protests were, under the late act 7 Vic. ch. 4, to be received as *primâ facie* evidence of due notice having been sent,—that defendant must have known whether the notices had in fact come to him in time or not,—and that his

letter, written on 19th May, 1843, with this knowledge, might be taken as an admission of due notice. It was objected for plaintiffs, that it was if anything proof of waiver of notice, and so not admissible under these pleas,—that the notary's certificate of due notice, nor even the letter of 19th May, could not be received to prove notice duly given—contrary to the facts in proof, that two of the copies of protests were not received till at least twenty-four hours after they should have come in course of post. The jury, without hesitation it seems, found a verdict for plaintiff on these three bills. Defendant has moved for a new trial, on the law and evidence and for mis-direction, and also on grounds disclosed in affidavits, namely the discovery since the trial of the fact, that the copy of protest of the first mentioned bill, namely that dated 13th December, 1842, was in fact not sent to Toronto, but got into the possession of one of the drawers, who retained it.

Crooks, counsel for plaintiff, insisted that his Lordship, who tried the cause, did not misdirect the jury on the trial, because he left all the evidence to them to find, in the first place if, at the time the letter of the 19th May, 1843, was written by Ross the defendant, he had knowledge of the bills declared on being over-due, and then that the said letter was a waiver of the notice of non-payment. The question as to whether this evidence of a subsequent promise was admissible under the pleadings was decided by his Lordship in favour of the plaintiff, and if the mis-direction complained of by the defendant consisted in this, it was very easily got over. It is laid down in the authorities on this point, that neglect to give notice of non-payment of a bill or note, or to protest a foreign bill or note, may be waived by a person entitled to take advantage of it. Thus it has been decided, that "part payment" or a "promise to pay," or "to see it paid," or "an acknowledgment that it must be paid," or "a promise to set the matter at rights," after he was aware of the laches, to the holder of the bill, amounts to a waiver of the consequences of the laches, and admits his right of action. Now, it is not intended to be relied on, that this letter of the 19th May, 1843, is evidence of the due notice of the dishonour of the bills in question; but it is insisted that the defendant, having written the letter in question with a knowledge of the facts, has thereby agreed to waive any right he might have had to his discharge from liability on those bills, by reason of the want of notice of dishonour, and having *waived* it, the law estops him from disputing or denying any state of facts which are necessarily admitted to exist by reason of the parties' admissions in this case; therefore, if the letter is a waiver of notice of dishonour, it is not now in the defendant's power to say that no notice of dishonour was given, and as this estoppel is raised by law, it implies due notice of dishonour, so that the issues on the record must be found for the plaintiff, and his lordship was right in his direction. As to the facts themselves, independently of the defendant's holding out to the manager of the bank here his unqualified liability upon the bills in question, and making frequent proposals for their arrangement (none of which were acceded to), this letter, written two months after the bills became due, accompanied with a knowledge of the mistake in the direction of the notices, according to the cases *Brett v. Levitt*, 13 East. 213; *Wood v. Brown*, 1 Starkie, 217; *Lundie v. Robertson*, 7 East. 231; *Gillon v. Coggan*, 2 Camp. 188; *Grenson v.*

Metz, 1 B. & C. 193—renders the defendant's liability on these bills complete, and although there may have been laches in the notice of dis-honour, this letter and the defendant's conduct quite put it out of his power to set them up as a defence to this action, and therefore your lordships cannot disturb this verdict on any of the grounds contained in the rule nisi.

Blake, counsel for defendant.

ROBINSON, C. J.—It seems to be assumed that in this case, the law of Lower Canada, not the law of this province, is to govern as to the time of giving notice of non-payment. The bills, though drawn in this province, were made payable in Montreal, being drawn on persons residing there, and this defendant indorsed the bill in this province, and resides here. The application of the doctrine of *lex loci contractus*, in such cases, does not seem to have been so nicely weighed, and so elaborately discussed in England, as in some other countries, but I take it to be clear, that with respect to the presenting and protesting the bill, it is the law and usage of the foreign country in which it is made payable that must give the rule (*a*). As to notice of non-payment to the indorsers, which is to follow the protest, admitting that that can properly be sent by the notary who makes the presentment, it would seem reasonable, and almost necessary, for avoiding irregularity and failure, that the time for his putting into the post the notice of non-payment, should be the same which, by the law of the foreign country in which he has made the presentment, is allowed for putting into the post a notice to an indorser resident in such foreign country. Otherwise, the notary requires to be acquainted with the laws and usages of all foreign countries regarding bills of exchange, and the holder of the bill is liable to great vexation and loss, from his want of that knowledge. It is treated, however, as a clear point, by Mr. Chitty on Bills, that the time for giving notice of the non-payment of a bill, is to be regulated by the law of the place where the indorser resided at the time the bill was indorsed, though he does in a note refer to *Rothschild v. Barnes* (*b*), as a case in which that point was questioned, and on looking at the case in the *Jurist*, I find the question was only raised there, but not discussed. In the later case, however, of *Rothschild v. Cary* (*c*), the point was expressly in judgment, and, after mature consideration, and review of authorities, the court determined that in such a case, the law of the place where the bill is made payable is to govern in regard to the time of giving notice; if this point had been raised at the trial, it would have made an end of all question here, but laying it aside for the present, the next thing to be considered is, that the due giving of this notice is here denied, by a distinct and separate plea. This was strongly dwelt upon in the argument, but there is no good ground for holding that any stricter or other proof of notice is required upon a plea going to this single point, than would have been necessary formerly, under the general issue, which was a denial of every averment in the declaration indispensable to the maintaining of the action. It would seem difficult to imagine any good reason why the new rules of pleading should have made a difference in this respect. It was not the intention of those rules, nor is it their effect, to require other proof of facts which must now be

(*a*) Chitty on Bills, 170. (*b*) 2 Jurist, 1484. (*c*) Q. B. Rep'ts, 43.

expressly denied by a distinct plea, than if the same facts had been put in issue by a plea denying, in general terms, all the statements of the declaration. The object of the rules was to relieve defendants from the necessity of giving any proof of facts which are not specifically denied,—not to exact any more rigorous proof of facts not admitted than it was necessary to give before. The Court of Exchequer in England have decided that the new rules make no difference in this respect (*a*); and Lord Denman, in the Queen's Bench, has expressed the same opinion (*b*). Then what proof of due notice was given on this issue? that is, of due notice of non-payment such as is required by the law of England, to which our law, in this particular, conforms. The objection to its sufficiency as regards two of these bills, is, that the notice came too late. Besides the memorandum or certificate of the notary, in each case, that he had forwarded through the post a copy of the protest to each of the indorsers, which is made evidence of the fact certified by our statute 7 Vic. ch. 4, sec. 3, the plaintiffs relied on the promise of the defendant contained in his letter of 19th May, 1843, and the verbal promise proved to have been made by him at other times. The defendant, it is true, gave evidence of there being other bills of Sanderson & Murray's indorsed by him, and held by the plaintiffs, and contended that the promises might be considered as relating to those bills, or that it was at least uncertain to which bills they had reference. That became of course a question for the jury, and Mr. Medley's evidence fully supported the conclusion of the jury upon that point. There could hardly indeed have been any hesitation, for the letter of 19th May, 1843, was written two months after these bills fell due, and it nowhere appears that any objection had up to that time been intimated by the defendant against paying these bills, on the ground of want of notice. On the contrary, it is sworn that no objection had been here made; and besides, the internal evidence of the letter itself, when we find the defendant afterwards deliberately stating, that he had once determined to pay the bills which are sued in this action, waiving any objection on the ground of notice, but had changed his mind, because certain offers, afterwards made by him, were rejected, there can be no reasonable doubt as to the identity of the bills. If there were other bills between the same parties respecting which there had been also an unfortunate miscarriage in the attempt to give notice, and to which, therefore, the letter and conversations would have equally applied, it was necessary for the defendant to shew that to the jury: and even then it would have been for the jury to say whether they were not satisfied that these were the bills alluded to. It need scarcely be observed, that if, after receiving such evidence they had found for plaintiff, connecting the letter and conversation with these bills, we should not have thought it right to interfere in the support of a defence, resting only upon the inference that, from a mere accident, the notice came to the indorser a day too late. The promise, then, to pay the bills, made more than two months after they were due, was not improperly, upon the evidence, referred to these bills, and it is quite clear, that it rendered all other proof of notice of non-payment, and even of presentment, unnecessary. The evidence of the notary's certificates, in addition, rendered the proof stronger than was

(*a*) *Croxon v. Worthen*, 5 M. & W. 5 (*b*) 1 Q. B. Rep'ts, 39.

required, for it cannot be denied, on the part of the defendant, that a promise by the indorser to pay, is at least *prima facie* evidence of notice of non-payment, and conclusive evidence where it is not repelled. Then how was this repelled? only by such evidence as shewed, that in consequence of an accidental blunder in directing the notices to the defendant at Kingston instead of Toronto, it was the opinion of those employed in the post office at Kingston, that such mis-direction must, under the circumstances proved, have occasioned the letters to be detained at Kingston one post, or twenty-four hours. If that were certainly ascertained, and there had been no subsequent promise, I have not yet brought myself to the conclusion, that the loss of one day on the road, in consequence of such an error of the notary, would necessarily be fatal, and must inevitably lead to the discharge of the indorser from a liability which he had deliberately assumed, and which may have been chiefly relied upon in giving confidence to the bill. In *Hilton v. Shepherd* (*a*), Lord Kenyon says, "I can understand that the law should require that due diligence should be used; but that it should be laid down that the notice must be given that day, or the next, or at any precise time, under whatever circumstances, is, I own, beyond my comprehension. I should rather have conceived, that whether due diligence had or had not been used, was a question for the jury to consider, under all the circumstances of *accident*, necessity and the like. I find invincible objections in my own mind, to consider that the rule of law requiring due diligence is tied down to the next day." Whether the accidental mis-direction of the notices in this case did occasion them to be a day longer on the road, or not, was a question of fact for the jury to find, under the evidence. Supposing that fact to be ascertained, then whether that delay, occurring as it did, would discharge the indorser, would, I conceive, be now held to be a question of law; and I must say that I should feel much difficulty in determining, if the case was necessarily to turn upon that, that the plaintiff had lost his remedy by a day's delay, under such circumstances. Reasonable time is to be determined upon a reference to circumstances, and what is reasonable time, Lord Coke says (*b*), "shall be adjudged by the discretion of the justices before whom the cause dependeth: for reasonableness in these cases belongeth to the knowledge of the law, and therefore is to be decided by the justices." For nothing that is contrary to reason, is consonant to law (*c*). I have a strong impression that it would be contrary to reason, and therefore ought in such a case to be contrary to law, to hold the defendant in this case discharged by the twenty-four hours supposed to be lost by the mis-direction of the notice. It is not the mistake of the holder of the bill, as in *Esderil v. Sowerby* (*d*), where a delay I believe of five days, arising from the holder addressing the notice to the wrong person, was held to discharge the indorser. A day lost by the carelessness or mistake of the postmaster, when the notice had been put into the mail in due time, would not have prejudiced the plaintiffs. It is impossible I think to hold, since the passing of our statute 6 Vic. ch. 3, that that the notary public is not a proper person to give notice, but that it must be left to the holder to call on the indorser, because that act (*e*)

(*a*) 6 E. R. 16, n.
(*d*) 11 E. R. 113.

(*b*) 1 Inst. 56.
(*e*) Sec. 2.

(*c*) Bayley on Bills, 189, n.

expressly enacts "That any note, memorandum, or certificate, made by a notary public, either in Upper Canada or in Lower Canada, in his own hand writing, or signed by him at the foot of, or embodied in any protest, shall be presumptive evidence, in Upper Canada, of the fact of any notice of non-acceptance or non-payment of any promissory note or bill of exchange, having been sent, or delivered, at the time and in the manner stated in such note, certificate or memorandum." Though upon the passing of this act in this country, it may, as in England, have been an officious and unavailing act in a notary who had protested a bill, to give notice of dishonour to the indorsers, it can not reasonably be held to be so here after the passing of this statute, for why should the legislature make the notary's certificate of notice being sent evidence of the fact, if the fact itself would be idle and insignificant. I consider that the intention of the act was, to make holders of bills in Upper Canada safe in relying upon notices of dishonour, when sent in proper time by a notary, and upon their certificate as evidence of the fact: and if that effect were not given to the statute, the holders of bills might justly complain that they were deceived and mis-led by it. Then if the notary, being a public officer, properly confided in by the holder of a bill for doing an act belonging to his office, should happen to make a mistake, the delay of a day occasioned by his blunder cannot be considered the laches of the holder, any more than a mistake of a postmaster, or of a letter carrier; and when no injury has really been suffered by the indorser in consequence, it ought not to prejudice the holder of the bill. He may possibly have assumed that the indorsers on the bill lived in Kingston, because the bill was made there, but if he knew this defendant's place of residence, and accidentally wrote Kingston on the back of the letter, when he meant to have written Toronto, it would have been a very venial blunder, and it would be hard indeed, that when no injury was occasioned by it, it should be attended with such consequences. Few persons, I imagine, have conducted much correspondence without having committed the same error more than once. Frequently the mistake is discovered before the letter is sent off, but it may happen to escape detection; and I will carefully guard myself against expressing the opinion in this case, that the law is so rigid that the delay of twenty-four hours, occasioned by a notary-public misdirecting a notice to an indorser, is to operate certainly in discharge of such indorser—though it cannot be shewn that his situation has been in the smallest degree prejudiced by it,—and though he may have indorsed the bill, as is most commonly the case in such transactions, not merely in order to transfer paper to which he had become a party in an executed transaction of business,—but for the express purpose of giving it credit with the bank to which it was to be offered for discount. If any weight can be attached to the language of Lord Kenyon, in *Hilton v. Shepherd*, that the question whether due diligence has been used or not, "is to be determined under all the circumstances of accident, necessity, and the like": and if what is reasonable is the law in such cases, then I could with difficulty bring myself to the conclusion, that if the holder of the bill had himself sent the notice, instead of the notary, an accident of this kind, occasioning a day's delay, must necessarily have deprived him of his recourse against the indorser, upon whose credit he was perhaps chiefly led to advance his money; and when no injury whatever has been produced to the indorser

by the delay,—when the mistake has been, as in this case, the mistake of the public notary, it would seem still more unreasonable. On the other side, of course, if the case turned on this single point, it would be strenuously urged, that some rule must in these cases be settled, and conformed to,—that the courts have established a certain rule, which is inflexible, and that to admit of exceptions on the ground of such accidents would impair the value of the rule; and we might come at last to the conclusion, that the general rule must be adhered to, in defiance of all considerations of accident and hardship, even to the extent to which it would be necessary to carry it in this case. At present I doubt whether we should find ourselves compelled to admit the law to be so unreasonable. But what, after all, is the rule. The notice in each case, according to the evidence given at the trial, appeared to have been put into the post at Montreal on the very day when these several bills were protested in the country in which they were made payable,—that was sooner than was necessary. It has even been made a question whether a notice sent or given on the day of payment, would not be irregular, on the ground that the acceptor has the whole of the day to pay the bill in. But sending the notice on the next day after the protest of a foreign bill, when the protest was made in time, which was not questioned in this case, is undoubtedly in time; and as in each case the notice appeared to have been put into the post one day sooner than was necessary, if it did by an accident meet with a day's detention at Kingston, still it would, in the common course of things, arrive at Toronto as soon as if it had been dispatched a day later from Montreal; so that I do not see how the defendant can be said to have made out that cause of discharge which he relies upon,—saying nothing at present of his subsequent promise to pay the bills. But when that promise was given in evidence, as it supplied, to say the least, *primâ facie* proof of due notice being received, so it entitled the jury to assume that the notice left Montreal on the day of the presentment, and did in fact arrive in Toronto as early as it would have done in due course, if it had been mailed on the following day, addressed as it ought to have been, and, if that had been the case, there would have been no failure. The promise, also, in my opinion, ought fairly to be allowed to have this further effect, that in order to repel the presumption of due notice which it raises, the proof should be such as to shew the contrary, conclusively. Now although the notary, meaning as we may suppose to go through his usual routine, sent this notice to the indorser,—which it is alleged was, from his blunder, delayed a day on the road,—it does not follow that the plaintiff's agent or correspondent in Montreal, who employed the notary, did not immediately send a notice by mail, properly addressed, and if he did, then the mistake of the notary would signify nothing. The defendant can hardly be said to have destroyed the presumption which arises from his promise, by shewing a mistake in the notary's effort to give notice. A verbal notice would suffice, and ought we not rather to entertain the presumption, that through another channel, namely the holder, due notice was received, than allow the presumption of due notice arising from the promise to be over-ruled by the evidence that was given here? As the case, however, was argued chiefly upon the main question, whether the promise of the defendant to pay these bills, being long after they had become due, and being an unqualified promise, was merely *primâ facie* proof of notice, and

would not support a verdict for the plaintiffs, if it was shewn clearly, that in fact notice was not sent in due time. Or whether it did not put all objection, on the ground of due notice, out of the question. I have not failed to consider it upon that ground, and the result of as full an investigation as I could give to the question, is, that such promise disables the defendant from resisting payment on the ground of want of notice. There is an evident difference between the effect of such subsequent promise as an admission of the fact of presentment, and its effect as an admission of due notice of dishonor being received. In the former case the indorser, when applied to, may be supposed to act under the impression that the holder of the bill has made a due presentment, a fact of which he knows nothing, and which he takes for granted at the time, upon his confidence merely, that all is right. There is nothing unreasonable therefore in allowing him, when he finds that in fact the acceptor has not been duly called upon, to dispute his liability, and put the party to the proof of what his promise would seem *prima facie* to have admitted. But of the other fact, namely, whether he has received notice of dishonour in due course, he cannot be supposed to be ignorant. If there has been a neglect in that respect, it must have been known to him. The distinction is noticed in Mr. Chitty's Treatise on Bills (*a*), and is a very obvious one. The decisions will of course be found to vary, as they regard the effect of want of presentment, or want of notice to the indorser. I have seen no decision of an English court which would justify us in holding, that after an unqualified promise to pay, made subsequently to the time when notice ought to have been received, an indorser, or drawer of a bill, can relieve himself from his liability, by shewing that in fact he did not receive notice in time. There may be found expressions of eminent judges, in several cases, especially modern ones, implying that even in such cases the promise supplies only *prima facie* evidence, which may be rebutted, and that the plaintiff's recovery may be defeated upon shewing the fact to be different from what the promise implied; but I have seen no case in which that point has been so ruled. I gather, on the contrary, from a number of English cases, decided by judges of the greatest eminence, that the law is clearly otherwise, and that the promise not only relieves the plaintiff from the necessity of proving notice, but puts the fact of notice wholly out of the question. It is not like a dispensing beforehand with notice, because that would require to be averred in the declaration, as an excuse or reason for not having done what would otherwise have been necessary. It is a waiver of the necessity of shewing notice, by admitting conclusively the right of the plaintiff to recover, and consequently, admitting notice, if that is indispensable to plaintiff's action. Mr. Justice Bayley is as high an authority as can be cited on this branch of the law, not only from his great experience and learning as a judge, but from the particular attention which he had devoted to the subject as a writer upon it. In the fourth edition of his work, the last that was revised by himself, he says, "Payment of a part, or a promise to pay, after full notice of the default, sufficiently shews that the party could not have sued on paying the bill or note," (he speaks here of the drawer and indorser of a bill) "and consequently, that he cannot insist on want of notice, or of a neglect

(*a*) Page 505, note *t*.

to present; a payment or promise, without notice of the default, does not." (a) I have already stated that any default in giving notice, must of necessity be known to the party entitled to receive it. In another passage Mr. Justice Bayley says, "An offer, after the bill or note has become due, to give the holder another bill in lieu of it, is an admission of the holder's title, so as to supersede the necessity of proving the indorsements, or other special facts" (b). If it be intended that nothing more is meant by this, than that notice may be presumed till the contrary appears, and that the defendant may retract his promise at pleasure, and destroy the inference raised from it, then I refer to a multitude of cases in which it did clearly appear in the evidence that due notice, though it was averred, was not in fact given, and yet that the subsequent promise, though not relied upon in the pleadings in any other manner than it is here, was held to be conclusive. In *Hopes v. Alder*, 40 Geo. III, before Lord Kenyon, the holder of the bill had not given notice to the drawer, but the latter, after the bill fell due, told the defendant "he would see it paid." The plaintiffs endeavoured to shew that they were relieved on other grounds from giving notice, but urged also, that independent of such considerations, the subsequent promise to pay put an end to any doubt." Gibbs, who was on the other side, (and who, I need hardly say, was a most acute and experienced lawyer,) "admitted that this last point was decisive." Lord Kenyon says, "whether reasonable notice have or have not been given must depend on the circumstances of the case, of which the jury will judge, but *here the subsequent promise is decisive.*" In *Anson v. Bailey* (c), the indorsee of a note, amused by promises of the maker, had refrained from giving notice to the indorser for three weeks. He then wrote to him stating what he had done, and the indorser, who was also the payer, answered that, "when he came to town he would set the matter right." The jury found for the plaintiff, though the maker was solvent when the note fell due, and became bankrupt before the letters were written. *Wilkes v. Jackes* (d): The bill was dishonoured, and *no notice given to the defendant* (the indorser). The plaintiff's counsel attempted to cure this negligence, by shewing that the drawer had no effects in the hands of the drawees. Lord Kenyon said, that was of no consequence, except in an action against the drawer; that the indorser was in all cases entitled to notice. The plaintiff then proved a letter of the defendant, acknowledging the debt, and promising to pay it: on which evidence he received a verdict. *Potter v. Rayworth* (e): Action by indorsee against first indorser of a note; notice of dishonour averred as usual; but it was proved, on the trial, that notice was not given to defendant till fourteen days after presentment. The plaintiff relied on a promise made by the defendant when called upon by a third party (a subsequent indorsee, who then held it), and contended that it was conclusive, either as an admission that he had had due notice, or as a waiver of such notice, if he had not had it. The defendant resisted the inference only on the ground that the promise was to a third party, and so not within the principle. The court sustained the verdict which had been rendered for the plaintiff, upon the ruling of Baron Graham. In opposition to this

(a) Pages 236, 231.

(c) Buller's N. P. C. 76.

(b) Page 378; 6 Esp. N. P. C. 43.

(d) Peake's N. P. C. 202.

(e) 13 E. R. 417.

objection, Lord Ellenborough remarks, "that the promise, whether made to the plaintiff, or to any other party who held the note at the time, was equally evidence that the defendant was conscious of his liability to pay the note, which must be because he had had due notice of the dishonour." Now the meaning of this must be, that after the promise in such a case, the court would not entertain the defence of want of notice, for it was denied on the record, as it is here, and it appeared much more clearly in evidence than it does in the case before us, that due notice was not in fact given. In the same case, Bayley, J. says, "the promise by the defendant was either an acknowledgment that he had due notice, or that without such notice he was the proper person to pay the note, as the party for whose use it was drawn." Which can only mean this: "it is just and legal to reject such a defence, after a promise to pay, even when the pleadings upon the record call for proof of notice, and the want of notice is shewn to the jury." Louder *v.* Robertson (*a*), is another very strong authority, so also is Borradaile *v.* Lowe (*b*), in which latter case, as here, it did clearly appear that due notice was not in fact given, but the plaintiff only failed to recover because the evidence of the subsequent promise was not satisfactory. In these cases, and in others that might be cited, the fact of due notice was averred, and was denied by the general issue, and the decisions shew clearly, that it was not merely that the plaintiff was relieved from offering evidence, as the point by the *prima facie* presumption arising from the promise, but that the effect went much further; and the defendant was *disabled* by such promise (at least when he did not shew that he was ignorant of the facts, which he neither did, nor could shew here) from urging such a defence. It was laid down by Lord Raymond, in Haddock *v.* Bury, that "if an indorsee has neglected to demand of the drawer in a convenient time, a subsequent promise to pay will *cure the laches* (*c*). But it certainly would not *cure* the laches if the defendant must succeed on shewing the laches. It does, however, *cure* them, by supplying evidence of due notice, which the defendant can not repel, because he can not rely upon an irregularity which he has waived. Mr. Chitty certainly so understands and states its effect, for he sums up the law thus, "390. The delay in making due presentment may be excused or waived, by a subsequent promise, or by other circumstances, which will preclude a party from taking advantage of the neglect to give notice of non-payment" (*d*). I find nowhere any of these cases to which I have referred over-ruled, or even their authority questioned. Hicks *v.* Duke of Beaufort (*e*), and Bell *v.* Franks (*f*), can certainly not be considered as opposing authorities, though they have been cited on the part of the defendants. On the contrary, it is impossible to think otherwise, on reading them, but that the judges who decided either of them, would have clearly refused to interfere with a verdict found for the defendant, in such a case as that before us. The conclusion I come to upon this question is perhaps no where better expressed than in Rogers *v.* Stephens (*g*), where there was an admitted want of notice, that the defendant had said "the bill must be paid,"

(*a*) 7 Ell. 231.

(*b*) 4 Taunton, 93.

(*c*) 7 E. R. 231, n.

(*d*) Chitty, on Bills, 500. (*e*) 5 Scott.

(*f*) 5 Scott, N. S.

(*g*) 2 Th. 719.

Ashurst, J. says, "The defendant's subsequent acknowledgment that the 'bill must be paid' amounts in point of law to a promise that it shall be paid; *and does away with the necessity of considering* the question relative to the want of notice." If any case could be shewn of an action against a drawer or indorser, where notice of non-payment being averred on the one hand and denied on the other, either by a distinct plea or by the general issue, and the plaintiff, having succeeded at nisi prius, has not been allowed to retain his verdict, because it appeared in the evidence that notice was in fact not given in time, although the defendant, after the time when he ought to have received such notice, had expressly promised to pay the bill; if any such decision, I say, could be shewn, we ought not, I think, to venture to take it as our rule in opposition to such a current of authority, unless it appeared, in the report of the case, that the previous authorities at variance with such decision had been considered and reviewed by the court, and had been advisedly over-ruled. I do not mean to say that in all cases it would be imperative upon us to conform to such last decision, even where the intention to over-rule is apparent, though I believe it will in general be found expedient and convenient that we should do so, especially whenever the new decision shall appear to have been in succeeding cases decidedly adopted as the rule in England; even where we may not be satisfied with the reasoning which led to the change. But that the last decision of any of the courts in England is to be unhesitatingly followed, however irreconcileable with previous authority not stated and considered in them, would never be safe or satisfactory. For then, whenever it happened that one of the courts, in the hurry of business, should lose sight of decisions and authorities which they had no idea of over-ruling, we must lose sight of them too, and must follow them in their departure from the right road, though certain to be obliged to return with them to the old path whenever they shall have leisure to observe the land marks. The learned counsel for the defendant referred, on the argument, to a case of *Whiting v. Burt*, decided very lately in the Supreme Court of the State of New York, in which the very point before us was considered, and he was so good as to furnish us with a report of the case, which is shortly stated in the *New York Legal Observer*. In any doubtful question before us, it will be always an advantage to know the light in which it has been viewed by a tribunal in another country, which follows, in the main, the same system, and where the judges are known to be men of great ability and research; and it is especially desirable when the point happens to be a novel one, arising out of transactions or circumstances unusual in England, and with which people in America are more familiar. This however is not the case in this instance. The point in judgment in *Whiting v. Burt* was, the sufficiency of the notice of protest sent to an indorser. The plaintiff, it is stated, "gave evidence *tendering to make out* a subsequent promise by the defendant to pay the note." The judge held the notice insufficient, and that the further evidence did not help the case. A new trial was moved for and refused. The learned judge who delivered the judgment of the court stated expressly, "that the evidence given by the plaintiff *fell short of making out* a promise, by the defendant, to pay after the note fell due." When this is stated, it shews at once that the decision, even if made in our own court, could not be relied upon as an authority. As the promise

was not proved, it became of course immaterial to determine what might have been its effect if it had been proved, and therefore, strictly speaking, what was said upon that point was beside the case, and extra judicial. The opinion is certainly expressed there, in terms very clear and decided, that an unqualified promise of payment, made by the indorser after the note became due, would not have availed, where it was shewn that notice was not duly given: unless it was affirmatively proved that the defendant knew when he promised that he had not been regularly charged. No English case was referred to, and the judgment was rested entirely upon an American decision which we are not possessed of. But I take it to be clear that, in English authorities, a man is in general assumed to know what he evidently and clearly had means of knowing,—a great portion of English law rests upon that principle, which is indeed the foundation of the assumption that every man knows the law of the land. Whether a person has or has not received a notice which is required to be given to himself, is a fact which in English courts of justice it is assumed that he not only may have known, but must have known.; and moreover, there can be no doubt in that point in this particular case before us, for the defendant by his declarations, both verbally and in writing, shews that he was aware of the defect, and had resolved to waive it, though he afterwards wished to retract his promise because a subsequent proposition of his partner's had not been acceded to. With regard to the affidavits filed in this case, we certainly ought not to be induced, in my opinion, on any ground furnished by them, to grant a new trial. At the trial, the evidence shewed the three bills to have been dealt with in the same manner in regard to protests and notaries. Upon an alleged discovery of new evidence, the court will duly grant a new trial, in order to advance the ends of justice, not to enable a defendant more successfully to escape from his liability when he had promised to pay the defendant, and when he has really suffered no injury from any antecedent irregularity which he desires to except against. The defendant must have known in May and September, 1843, that he had received no notice whatever upon this bill, though it had fallen due in March preceding, and when the plaintiff's witness repeatedly spoke to him respecting all the bills now claimed. The view taken of this case by the learned judge at the trial, was in my opinion perfectly correct, and it has never appeared to me that we should be justified in setting aside this verdict. I have had to go more at length into the several questions than may seem necessary, because the amount involved is large. The several questions are important in their nature, and of frequent occurrence, and it seemed due to the earnestness and ability with which they were argued on both sides, that the authorities cited should be carefully investigated. The learned judge I think, at the trial, left the case to the jury on perfectly fair ground, and more favourable in one respect for the defendant than the *English authorities* seem to warrant. I consider the fair construction of the defendant's letter of 19th May, (to say nothing of subsequent conversations and letters,) to be this, that it refers to all their indorsements of Sanderson & Murray's bills, *then* past due, without allowing for any such reservation of claim to exemption from any defect of notice, to which they make no allusion. If they did mean to take advantage of any such irregularity, they must have known the ground of it long before, and should have

made the exception. When one person writes to another of his liabilities on paper, he means his liabilities on the face of the bills. It is stated to have been the opinion of London merchants, that any cause preventing the holder without his fault from protesting a bill, as his detention by contrary winds, illness, &c., would excuse him from protesting. And it is stated by Mr. Chitty, "that it certainly is not the practice among merchants of respectability, to avail themselves of the neglect to give immediate notice of dishonour, when no loss has resulted from the delay (a). I mention this merely to shew the construction which I think should reasonably be given to defendant's letter of May, 1843, namely, that he and his new partner would pay all his past due liabilities on Sanderson & Murray's bills, without meaning to reserve to himself a right to except for want of notices, which, to be available at all, must have been given many weeks before.

JONES J.—Two questions arise: First, Was the notice of non-payment of the bills by the plaintiffs, as holders, to the defendant, as indorser, in time? Secondly, If insufficient, does the promise to pay, subsequently, by the defendant, entitle the plaintiff to recover? Notice of the dishonour of a note or bill must be given to the parties to whom the holder intends to resort, within a reasonable time (b); and notice on the second day seems to be regarded as reasonable (c). Notice need not be given with all the dispatch that can possibly be used (d), but it must be given with all the dispatch that can be reasonably expected. What is reasonable notice is a mixed question of law and fact, under all the circumstances of the case (e). Mr. Chitty, in his treatise on bills of exchange and promissory notes, says, that notice may be given by letter put into the post office on the day on which the party is entitled to notice, or it may be sent by a private hand, provided it be delivered on the same day that it would have arrived by post. Per Abbott, C. J., "The time within which notice of the dishonour of a bill must be given, I have always understood to be the departure of the post on the day following that on which the party receives the intelligence of the dishonour." Here the letter containing notice of the dishonour of the note was put into the post office at Montreal, addressed to the defendant, at Kingston, instead of Toronto, his residence and place of business, on the day of the dishonour. In consequence of the erroneous address, it appears from the evidence, that the defendant must have received the notice twenty-four hours later than he would have received it if it had been directed to Toronto, but at the same time that it would have been received if put into the post office on the day succeeding that after which the note was dishonoured. From the authorities before cited, this is sufficient notice. As to the second point, I think the defendant's promise to pay (regarding the notice as insufficient) dispensed with proof of notice of dishonour. It was within the defendant's knowledge, that he had not received due notice of dishonour if none had been received, or if the one received was not in time, but he nevertheless subsequently promised to pay the notes. This has always been regarded as evidence to support the allegation of notice of dishonour, upon the ground that it is *prima facie* evidence of due notice.

(a) Chitty, 452, n.
(d) 9 East 347.

(b) 6 East 3; 3 B. & P. 601.
(c) 2 Camp. 208.
(e) Hilton v. Shepherd, 3 E. 14; Hopes v. Alder, 3 E. 16.

or that, notwithstanding the want of notice the defendant was conscious that he was the proper person to pay the note, and that the holder had a right to resort to him for payment (*a*). Mr. Phillips, in his treatise on Evidence (*b*) says, "the proof of the presentment, and of the notice of dishonour, will be dispensed with if the defendant, knowing the default, has paid any part of the money, or promised to pay, after the note became due: for this is an admission on his part, that the plaintiff had a right to resort to him upon the note, and that he himself had received no damage from the want of notice. But if the drawer, or indorser, after being arrested, merely offered by way of compromise, without acknowledging his liability, to give a bill for the sum demanded, this will not dispense with proof of the notice of dishonour; such an offer is not a waiver of the objection (*c*). It was contended, in argument for the defendant, that the subsequent promise to pay would not dispense with the proof of notice of the dishonour of the note, when want of notice was the direct issue. So in 5 M. & W. 5, it was argued by counsel, that the subsequent promise did not dispense with direct proof of the issue that the note was presented; that now, since the new rules, when a precise issue is joined on the allegation of presentment, the question was different, and if it be intended to insist that that step in the proceedings had been waived, that should be replied. But Lord Abinger says, "I do not see that the question is at all affected by the new rules; a subsequent promise admits all that was necessary to entitle the plaintiff to recover." And Parke, B. says, "Mudie *v.* Robertson disposes of the question. Under the old form of pleading the plaintiff would have only supported his declaration on the ground of the subsequent promise being a *prima facie* admission of presentment having been duly made, therefore *the new rules make no difference*." Baron Alderson says, "Before the new rules were framed, all the material allegations of the declaration were put in issue by the general issue, therefore the plaintiff was to prove all, that is, each and every of them. Now, each must be separately denied; but still the same evidence will apply to the particular allegation put in issue. In this case it was argued, that the subsequent promise to pay being only *prima facie* evidence of due notice, that *prima facie* case was submitted by the proof that the letter containing the protest was misdirected. If this should be so considered, it may be argued, that the promise to pay is an admission of notice, because the plaintiffs, as holders, may themselves have sent due notice by the post. But at all events it admits that the defendant considered himself the proper person. I am therefore of opinion, first, That notwithstanding the mistake in the address of the letters giving notice of the dishonour of the notes, the letters appearing to have been received at the same time that they would have been received if put into the post office on the day after the dishonour, instead of the day of the dishonour, as was the case, that notice of dishonour was sufficient. Secondly, That if no evidence had been given of the notice of dishonour, the subsequent unconditional promise to pay, with the knowledge of the default, dispensed with the proof of notice. Thirdly, That a promise to pay, after dishonour and knowledge of laches on the part of the holder, is evidence to support

(*a*) 2 T. R. 718; 7 E. 231; 12 E. 38; 15 E. 275; 6 E. 16; 1 Taunt, 12; 2 Stra. 1246; 1 Esp. 58; Bul. N. P. 276.

(*b*) Vol. 2, page 24.

(*c*) 5 C. & P. 406; 3 C. & P. 338; 5 C. & P. 437.

the issue taken upon the averment in the declaration, that due notice of the dishonour had been given as well since the new rules as before. The case in 1 Q. B. Reports, 43, to which the notice of the court has been called since the argument, determines, that the law of Lower Canada, where the bills are payable, is the law which must govern the case with regard to notice of dishonour. This seems not to have been so considered at the trial, it not being so contended there, nor the law of Lower Canada produced to shew that the notice would have been in time by that law.

MCLEAN, J., and HAGEMAN, J., concurred.

Judgment for plaintiff.

LUSTY v. VAN VOLKENBURGH.

Where plaintiff and defendant submit to arbitration all causes of action, &c., and an award is given, and plaintiff afterwards sues defendant for a cause of action not brought before the arbitrators, upon the ground that at the time of the submission plaintiff had no knowledge of its having accrued, an issue tendered as to the fact of such knowledge is material.

Plaintiff brings his action 27th February, 1844, and declares in case for criminal conversation with his wife on 21st June, 1838, and on divers days, &c. between that day and the day of bringing the action. Defendant pleads that on 9th March, 1842, the plaintiff and he submitted to arbitration all actions and causes of actions, &c. &c., quarrels, controversies, trespasses, damages and demands whatsoever, at any time theretofore done, had, suffered or committed by or between them, so that the award be made in writing, and on or before 18th March then next. That the arbitrators, on the 18th day of March, having *considered the matters in dispute* between plaintiff and defendant, made their award of and concerning the grievances in the declaration mentioned, and awarded that all actions, suits, quarrels and controversies whatsoever, had, made, moved, arisen or depending between the said parties, in law or equity, for any matter or cause whatsoever touching the said premises to the making of the award, should cease, &c., and then the plea sets out the particulars of the award as to various sums to be paid by defendant to this plaintiff, and directing mutual releases by each to the other, of all actions, causes of action, damages, claims and demands whatsoever, subsisting or depending before 9th March, 1842. Plaintiff replies, that the grievances in the plea mentioned are a part only of the grievances for which he brought his action, and which were committed on 21st June, 1838, and on divers days, &c. between that day and the making of the said bonds of submission, and that although he submitted to arbitration, as pleaded, all trespasses, demands, &c., yet, at the time of such submission, and for a year and nine months after, viz., until 8th December, 1843, he did not know of the committing of those grievances by defendant, or of any of them. That he did not submit the said grievances, or any part thereof as in the said third plea alleged, nor were the same brought before the notice or consideration of the said arbitrators, or either of them, to be awarded upon, nor did they award concerning the same, as defendant has pleaded. Plaintiff in this replication further avers, that he sued also for the grievances committed after the entering into the submission. Defendant rejoins, that as to the grievances committed between 21st June, 1838, and the entering into the submission, plaintiff before and at the time of

the submission knew of the committing of those grievances, &c. Plaintiff demurs to the rejoinder, and alleges for cause, that it tenders an immaterial issue, that it does not deny what is pleaded by plaintiff, namely, that the parties did not submit the grievances committed before the submission to arbitration in any other manner than by affirming that the plaintiff knew of them, and it assumes to raise the inference that because he knew of them therefore he did submit them, although the plaintiff had expressly averred in his replication that he did *not* submit those grievances to arbitration, and that they were not in any manner awarded upon.

A. Wilson, counsel for plaintiff.

Ewart, counsel for defendant.

ROBINSON, C. J.—We are of opinion, that the defendant is entitled to judgment on the demurrer. The submission set out is in such terms that it obviously and undeniably does embrace all causes of action which had theretofore accrued between the parties. There was no injury or cause of action which could be referred, that was not included in the comprehensive terms of this submission. The injury for which this action is brought is one that may be referred, and it comes, therefore, within the scope of the reference. Then the plea sets out that the arbitrators did consider the matters in dispute between the parties—that is, they considered whatever was brought before them—they could of course consider nothing more, and they made their award concerning the grievances in the declaration mentioned; and so they did, when they made such an award as is set out, for they did award that all suits and controversies should cease; they settled certain matters specifically, which we are bound to suppose was all that was brought before them, and they then awarded that each should release the other from all causes of action, damages, claims and demands whatsoever. This in effect settled every thing. In making this award, as every thing was submitted which could be brought forward as a charge or demand by one against the other, the arbitrators appear to have assumed that when they had settled all that either party had brought before them for investigation, they had adjusted all claims and demands between them upon any account previous to the submission, and they therefore felt themselves at liberty to direct mutual releases to be executed. Such an award bars as effectually, when the arbitrators have power to direct such releases, without any release being in fact given, as if they had been given in pursuance of the award. The arbitrators, we think, clearly had a right, upon such a submission, to conclude each party as to all causes of action anterior to the submission. The plaintiff, in his replication, does not deny that he did in fact submit all causes of action accrued before the submission ; he could not deny it with truth, for the writing speaks for itself; and he therefore does in terms admit that he did submit all that had occurred before the submission, as the defendant had pleaded. But then he says, although part of these grievances were committed before, yet he did not know of them till long after the arbitration, and therefore that he did not submit them to be awarded upon, and that they were not in fact awarded upon. Now it is plain he can mean nothing more by this replication, than that as he did not know them, he did not bring them in fact before the arbitrators, and so did not in that sense submit them, and that as the arbitrators heard

nothing concerning them, they could not have intended to include them in their award. He could not mean to say that they did not come within the scope of the reference, because that would have been repugnant to what he had expressly admitted, nor could he say that the award did not in terms extend to it, because it evidently does in its terms cover every thing. We can therefore only make this replication consistent with itself, by considering that the plaintiff relies upon it as an inevitable inference, that any claim of which he was not aware was not in fact submitted and awarded upon, whatever may have been the language of the submission and of the award. The defendant understanding then, as we think, the effect and meaning of the replication correctly, denies that upon which the plaintiff clearly rests his right to sue, and he affirms that the plaintiff, before the submission, did know of the committing of the grievances. That was not tendering an immaterial issue; the plaintiff had admitted that he had submitted every thing by the terms of his bond, and he had not denied that the arbitrator had awarded mutual releases of all causes of action; he had admitted, therefore, all that was necessary to shew that *prima facie* at least these grievances came within the scope both of the reference and the award. His replication, therefore, can only be a good plea for the purpose of taking this cause of action out of the scope of the reference and the award, upon the principle, that as he was not aware of this cause of action, he could not enable the arbitrator to entertain it, and that in that sense it was not submitted, and not awarded upon. This ground then is fully met and answered by the defendant, when he says, the plaintiff did know of this cause of action before the submission. Upon the argument of this demurrer, the plaintiff's counsel contended that whatever either party did not in fact submit was not in difference, and therefore the award does not extend to it, whatever may be the terms of the award or of the submission; and certainly the cases of *Raver v. Farmer* (*a*), *Golightly v. Jellicoe* (*b*), seem at first sight to go that length, and I observe that, in treatises upon awards, there is language used upon this point which seems to lead to the same conclusion; but in both the cases I have referred to, it was only all *matters in difference* that were submitted, whereas here every cause of action, trespass or demand is submitted, not merely such as had been the subject of any previous dispute. In *Smith v. Johnson*, the Court of King's Bench determined, that when a matter comes within the scope of the reference, neither party has a discretion to keep it back, and make it the subject of a future claim, but he is bound to bring forward his claim, unless indeed he was not aware of it, and on that account the arbitrators could not take it into their consideration. So also in *Dunn v. Murray* (*c*), the court, adverting to the case of *Smith v. Johnson*, say, "it is certain the present claim *might* have been brought before the arbitrator upon that occasion, and it was the duty of the plaintiff to bring it before the arbitrator if he meant to insist on it as a matter in difference, and not having done so, he cannot now make it the subject matter of a fresh action." If the submission, in the case before us, had been of all *matters in difference* merely, as the cases which I have referred to were, it might have been concluded, as was contended in those cases, that the matter afterwards sued upon was not so closely connected

with any subject of former differences as to come within the scope of the reference; but where all matters are referred, and not only matters in difference, the case is much stronger, and it is impossible in our opinion to say, either with literal truth or with reason, that there could be any thing which did not come within the scope of the reference, if the party knew of it and could have submitted it. Upon these grounds we think that the issue upon the point of knowledge was material, and in fact the only material issue which the previous pleadings admitted of, and that the judgment must therefore be against the demurrer. It was argued that the award was bad upon the face of it, and so could not conclude the parties; but we see no ground for holding the award void.

JONES, J.—For a cause of action not brought before the arbitrators, and not known to the plaintiff at the time of the submission, the plaintiff must be entitled to recover, otherwise a plaintiff, the holder of a bill of exchange, drawn by a defendant here upon his correspondent in England before a submission to arbitration, and dishonoured there the day before such submission, would be precluded from recovering upon it against the defendant, by reason of the award made upon other matters in dispute, although such dishonour could not, at the time of the submission, have been by possibility known to the plaintiff, and, in consequence, the claim was not laid before the arbitrators. In my opinion the issue taken by the defendant in his rejoinder was material, and therefore judgment I think must be given for defendant on the demurrer to that plea. The claim must be shewn to be known to the party at the time of the submission, otherwise he would not be precluded from recovering in a subsequent action for that which was not submitted, because not known.

MCLEAN, J., and HAGEMAN, J., concurred.

THOMAS v. PLATT.

The swearing falsely by a voter at an election of alderman or common councilman, for the city of Toronto, that he is the person described in the list of voters entitled to vote, is not perjury by any express enactment; and a plea of justification to a declaration on the case for imputing perjury to plaintiff, on the ground of such false-swearers, is bad on demurrer.

Action on the case: First count, malicious prosecution. Second count, that defendant, on the 10th day of January, 1844, in a certain discourse which defendant had, in presence and hearing of divers persons, of and concerning the plaintiff, falsely and maliciously spoke and published of and concerning the plaintiff, that he was guilty of perjury: whereby, &c. Pleas—1st, general issue; 2nd, a justification, charging plaintiff (claiming the privilege of voting at an election of alderman and common councilman, to serve for the Ward of St. David, in the corporation of the city of Toronto), with having committed false-swearers, in taking an oath duly administered to him by the returning officer of the said ward, that he was the person described in a certain list of voters for the said ward—Replication to first plea, similiter: to second plea, plaintiff demurs, for that the statute under which the oath mentioned in the second plea was administered, does not make the false-swearers perjury.

Crooks, counsel for plaintiff.

Sherwood, Q. C., counsel for defendant.

ROBINSON, C. J.—We are of opinion that the plaintiff must have judgment. It is clear that the swearing falsely by a voter, at an election of

alderman or common councilman for the city of Toronto, that he is the person described in the list of persons entitled to vote, is not made perjury by any express enactment. The stat. 7 Will. IV., ch. 39, is silent on the subject. The 32d clause, which requires the oath, does not make false-swearers in the matter perjury, nor does any other clause in that statute do so, either specially, or in general terms; and as sec. 14 of the same statute does make it perjury to swear falsely in another matter provided for by the same act, where a special provision from the occasion and nature of the oath would seem less necessary, we cannot supply the omission in regard to this oath. Looking at the 33d, 34th and 35th sections of 4 Will. IV., ch. 23, it is plain that the legislature did intend that an oath of this kind should be made the subject of prosecution for perjury; but, through the repeal of the 34th clause of this act by the 2d clause of the later statute (7 Will. IV., ch. 39), the necessary provision has been inadvertently dropped. There being, then, no general enactment, we are of opinion that such an oath, taken for such a purpose, is not an oath upon which, by the common law, perjury can be assigned, not being in any judicial proceeding, or in anything tending to render effectual a judicial proceeding. The learned counsel for the defendant argued that, when the oath is expressly required to be taken by a positive law, and is administered by competent authority, the distinction is between promissory oaths (as oaths by jurors), and oaths which, like the present, attest a fact; which latter, he urged, would in all cases afford ground of prosecution for perjury; but we do not find any authority for drawing the line of distinction upon that principle. The common law definition of perjury yet holds, that it must be a judicial proceeding.

JONES, J.—The plea (to the second count of the declaration, in which it is alleged that the defendant charged the plaintiff with the crime of perjury) justifies the charge by stating that the plaintiff swore falsely at an election of an alderman and common councilman to the corporation of this city, under the stat. 7 Will. IV., ch. 39. This statute does not make such false-swearers perjury, and the oath taken, not being in a judicial proceeding, although false, cannot constitute the crime of perjury, and therefore the plaintiff must have judgment upon the demurrer.

MCLEAN, J., and HAGERMAN, J., concurred.

Judgment for plaintiff on demurrer.

HART, ET AL. v. DAVY.

A plea to a declaration on a promissory note setting up a parol agreement inconsistent with what the indorsement on the note imports, is bad.

Declaration, assumpsit. That one Donald McKenzie, on 30th day of January, 1843, made his promissory note in writing, and thereby promised to pay the defendant, or order, six months after date, 64*l.* 17*s.* 5*d.*, which period had elapsed before commencement of suit; that defendant indorsed the same to plaintiffs; that Donald McKenzie did not pay the amount thereof, though the same was duly presented on the day when it became due, of which defendant had notice, &c., whereby, &c. To this declaration the defendant in his fourth plea saith, "That at the time when, &c., to wit, the indorsement and delivery of the said note to the plaintiffs, in consideration that the defendant would indorse the said note, and deliver the same to the plaintiffs, the plaintiffs undertook and agreed with the defendant, that

he should not be liable to the payment of the said sum of money in the said note specified, or any part thereof, and should not be prejudiced, or put to any costs, or any way suffer by reason of such indorsement, so made as aforesaid. And the defendant avers that such indorsement and delivery he made on the conditions aforesaid, and this the defendant is ready to verify, &c." Demurrer to fourth plea: "That it is not shewn that any want or absence of consideration existed for the indorsement of the said note by the said defendant to said plaintiffs; that any legal consideration existed for the said agreement; or that such agreement was in writing; or that it was an accommodation indorsement." Joinder in demurrer.

Meyers, counsel for plaintiff.

Ross, counsel for defendant.

ROBINSON, C. J.—The plea is clearly bad, as setting up a parol agreement inconsistent with what the indorsement imports (*a*).

Judgment for plaintiff on demurrer.

MAXWELL v. RANSOM.

Plaintiff declares in debt on bond for the performance of an award. Defendant pleads *no award* upon the premises. Plaintiff replies, setting out an award. Defendant rejoins matter extrinsic of the award, and relies upon it for shewing the award void. The rejoinder is bad, as being a departure from the plea.

Declaration, debt on bond: non-performance of award. Defendant cravesoyer of the bond and condition and pleads, first, *Non est factum*; second, *No award*. Replication: Plaintiff enters a similiter to the first plea, and to the second, sets out an award. Defendant rejoins, that arbitrators did not make their award in the premises, because, at the time of making the bond 221*l. 7s. 11½d.* was due from the plaintiff to defendant, for work, &c., and if this bond be taken into consideration by the arbitrators, 52*l. 6s. 7½d.* would have been found due to the defendant, after deducting the sums found due from the defendant to the plaintiff. And that the arbitrators had notice of such claim, but did not award thereon. Demurrer to rejoinder: first, that the traverse contains a negative pregnant; secondly, that rejoinder is a departure from the plea.

Blake, counsel for plaintiff.

Vankoughnet, counsel for defendant.

ROBINSON, C. J.—There is no valid objection, I think, to the replication. The rejoinder appears to be bad, as a departure. Defendant pleads *no award* upon the premises. Plaintiff replies, setting out an award. Defendant rejoins that he had a set-off, on which the arbitrators might have awarded, and gave them notice of it, but that they did not award upon it. 16 E. R. 58, is clearly no authority for this rejoinder, because in that case the matters which were relied on as shewing the award to be void, were pleaded as a distinct plea, at the same time with a plea of *nul agard*, not following (as in this case) a replication to a plea of *nul agard*. Fisher v. Pimbley (*b*), is relied upon by the defendant's counsel, as supporting this pleading, and the Court of Exchequer seem in one case to have regarded it in that light (*c*), but it seems clear to me that it does not. The circumstances of that case

(*a*) 3 Camp. 58; Chitty on Bills; 6 Ed. 142, 144; 1 Gow. 74.

(*b*) 11 E.R. 188.

(*c*) 3 M. & W. 72.

were altogether different. The defendant there had pleaded no award. The plaintiff replied, setting forth so much of an award as suited his purpose. The defendant rejoined, setting out the whole award, from whence it appeared that the award on the face of it was clearly bad, and then demurred. The court considered that he might do that, for they said, if the plaintiff had set out the award truly, it was clear the defendant might have demurred, but not having set it out truly, where is the inconsistency or departure in the plea, in the defendant's doing that which the plaintiff ought to have done, setting out the award in full, and then demurring. Mr. Chitty, in his treatise on pleading (*a*), states the defendant to be at liberty so to rejoin only when the fatal defect appears on the face of the award, which is not the case here. A principle of pleading which had so clearly the sanction of Lord Kenyon and his brother judges, in *Praed v. the Duchess of Cumberland* (*b*), must be shewn to be clearly exploded, before we can allow a defendant to resort to extrinsic circumstances in his rejoinder, and rely upon those for shewing an award void, which upon the face of it is good, after he had in his plea denied that any award had in fact been made. The language of Ashurst, J., in the last mentioned case, received the full concurrence of the very learned judges who sat with him. "The rejoinder, he says, is clearly a departure from the plea in bar. A memorial was enrolled, which upon the face of it was a good one, and if the defendant wished to have impeached it, she should have pleaded it, and shewn in what particular it was defective, and thus have compelled the plaintiff to take issue upon that fact. But having in her plea in bar alleged that there was no memorial, she ought not afterwards to be permitted to admit in her rejoinder that there was one, and then deny the validity of it." Such a case is precisely like the present, and I cannot consider the doctrine overruled, though it may not in all cases have been correctly applied.

JONES, J.—I think the rejoinder is a departure from the plea, because in the plea the defendant says that the arbitrators made *no award*, whereas in the rejoinder he says that they did not make their award in the premises, because *at the time of making their award* the plaintiff was indebted to the defendant, and that if such claim had been considered by the arbitrators, a sum would have been found due to the defendant, deducting the sums found due from the defendant to the plaintiff, thereby clearly admitting that an award was made (*c*). The award appears to me not open to the objections taken, first, Because it makes no reference to the suit submitted. It awards two sums to be paid by the defendant to the plaintiff, which must be taken to be for the claims of the plaintiff in the suit against the defendant, till the contrary is made to appear, and thereby is final as regards the suit referred, although it is not in terms put an end to. Secondly, Because it is bad for uncertainty in the part regarding the key of the building. If it were so, it cannot affect the other parts of the award for which the action is brought, and for the non-performance of which breaches are assigned.

MCLEAN, J., and HAGEMAN, J., concurred.

Judgment for plaintiff on demurrer.

(*a*) 1 Vol. 675.

(*b*) 4 T. R. 588.

(*c*) 1 Wils. 122.

FLAHERTY v. MAIRS.

To an action on common counts, for board, &c. found for defendant's illegitimate child, at defendant's *request*, alleging a subsequent promise of defendant to pay, &c., defendant pleads a denial of the *request*. The plea is bad, as resting the defence on an immaterial point; the promise should have been denied.

Declaration, assumpsit. First count, "for meat, drink, washing and lodging, goods and chattels, and other necessaries, by plaintiff found and provided at the request of the defendant, for the infant illegitimate child of the defendant." Second count, "for money paid in and about, work and labour, care and diligence, in nursing the infant 'illegitimate child of defendant, and at defendant's request.'" Second plea to first count, "that the said illegitimate child was born after the 4th of March, 1837; that, ever since its birth, defendant has been always ready and willing, and offered to take and receive the said infant illegitimate child, and to make provision for its support, and to keep and maintain the same, as a member of his (the defendant's) family; of all which the plaintiff, before the said meat, &c., were found and provided by the plaintiff for the said illegitimate child, as in the said first count mentioned, had notice, without this, &c." Third plea to second count, the same, mutatis mutandis, as second plea to first count. Demurrer to second plea, "that it does not shew to whom the defendant offered to take the said child, or that the offer was made before the commencement of this suit; that it does not shew the provision for the support and maintenance was a sufficient provision for the child; that it does not appear how the plaintiff's knowledge of defendant's willingness to provide for the child can be an answer to the said first count, which is founded on a contract made between the plaintiff and defendant, as is stated and set forth in the same count; that the plea does not contain a full traverse of the defendant's liability, for instead of directly traversing the *request*, it ought to have denied the making of the *promise* which the plaintiff hath alleged the defendant did make; and that it does not shew what right or title the defendant had or has to the custody of the child, and to make provision for it, or whether he is the person who ought to have the legal care or custody of it, by right agreement or otherwise." Demurrer to third plea to second count, mutatis mutandis, the same. Joinder in demurrer.

Baldwin, counsel for plaintiff.

Wells, counsel for defendant.

ROBINSON, C. J.—The pleas are bad, I think, as amounting to non-assumpsit,—denying the *request* is not an answer to such causes of action as are declared on. If the board, &c., were not found at defendant's *request*, then plaintiff could only rely on an implied promise arising from the statute, and the promise would not arise unless plaintiff provide as stated in 7 Will. IV. ch. 8, sec. 4; the general issue would put all in issue. For all that appears in the declaration, the plaintiff may have furnished the board, &c. for defendant's illegitimate child, and not at defendant's *request*. But defendant may have undertaken afterwards to pay, and such promise I conceive would be binding, without aid from the stat. 7 Will. IV. ch. 8. It was therefore attempting to rest the defence on an immaterial point, namely, the previous *request*, when a subsequent

promise was alleged. It is the promise that should have been denied. 5 Taunt., 48 shews, that defendant, promising to pay for board, &c. furnished to his illegitimate child, would be liable. Then he should have denied the promise, not the request. He seems to have assumed that plaintiff must necessarily be suing under the statute, but there was no ground for concluding that.

JONES, J., McLEAN, J., and HAGEMAN, J. concurred.

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Judgment for plaintiff on demurrer.

BALDWIN AND SULLIVAN v. McLEAN.

A plea of the Statute of Limitations concluding to the country, is bad.

Declaration, assumpsit, common counts. Second plea, Statute of Limitations, concluding to the country, &c. Demurrer to second plea: For "that while it contains new matter, and requires to be answered specially, the defendant has concluded his said second plea to the country. And while making tender of issue in this way, the defendant is trickily endeavouring to draw the plaintiffs into taking a useless and insensible issue, for there is at present only a negative averment, and no affirmative thereon to complete a formal issue. That by thus concluding to the country, the defendant desires to exclude the plaintiffs from making any answer to the said plea, by which they might bring themselves within the meaning and protection of the Statute of Limitations, and maintain their said action against the defendant, though the causes of action in the said declaration contained, did not accrue within six years next before the commencement of this suit. Joinder on demurrer.

Wilson, counsel for plaintiffs.

J. Duggan, counsel for defendant.

ROBINSON, C. J.—We are of opinion that the plaintiffs are entitled to judgment. The defendant answers the plaintiffs' demand by pleading that his cause of action did not accrue within six years before the commencement of his action, and concludes at once to the country, which he can only do where he has simply denied what the other has affirmed; and where, consequently, the plaintiff can have no occasion or right to reply. But here he had a right to reply, either a subsequent promise, or any of the exceptions in the statute, or that the demand did accrue within six years, for in his declaration he had not yet asserted that; it comes as a statement of new matter from defendant. The case of *Bodenham et al. v. Hill* (a), does not apply. It only shews, so far as it may be relied on, that this plea, being of negative matter only, need not conclude with a verification, because the proof of the affirmative would be on the plaintiffs; not that it could close the pleadings by concluding at once to the country.

JONES, J., McLEAN, J., and HAGEMAN, J., concurred.

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Judgment for plaintiffs on demurrer.

KINGSMILL (Sheriff) v. GARDINER ET AL.

Non *damnificatus* is no answer to a declaration on a bond containing specific conditions. In an action against a sheriff on a limit bond, it is not necessary to shew that the sheriff has actually sustained a pecuniary damage.

Declaration, debt on bond to the limits. Third plea, non *damnificatus*. Demurrer to third plea: For "that the condition of the said writing obligatory is for the performance of certain specific acts, and not to indemnify the plaintiff generally; and that such general plea of non *damnificatus* is not admissible, but is inconsistent with the condition of the said writing obligatory, and repugnant thereto." Joinder in demurrer.

Blake, counsel for plaintiff.

H. J. Boulton, counsel for defendants.

ROBINSON, C. J.—Plaintiff is clearly entitled to judgment on these demurrs to the third plea of each of the defendants. Non *damnificatus* is no answer where the condition of the bond is so specific as this is. It was necessary for the defendants to plead either that the debtor remained upon the limits, or if he withdrew, that he did not thereby subject the sheriff to an action. To maintain an action on this bond, it is not necessary that the sheriff should actually have sustained a pecuniary damage.

Judgment for plaintiff on demurrer.

WHITFIELD v. TODD.

The statute 7 Will. IV. ch. 8, restrains the master of an unmarried female from suing for her seduction until six months have elapsed from the birth of the child, and it be first seen whether the father or mother of the female, within that time (not having abandoned her before the seduction), intend bringing their action.

Case for seducing plaintiff's servant. Plea: "That Elizabeth Bowstead in the said declaration mentioned, never has at any time been married, but always hath been and still is an unmarried female. That the alleged debauching and carnally knowing of the said Elizabeth Bowstead as in the said declaration mentioned, by the said defendant, were committed by the defendant after the fourth day of March, which was in the year of our Lord 1837, and since the passing of the statute which was passed in the session of parliament held in the seventh year of the reign of our late lord king William IV., entitled an act to make the remedy in cases of seduction more effectual and to render the fathers of illegitimate children liable for their support, that is to say at the time in the said declaration mentioned. That long before the time of the said alleged debauching and carnally knowing of the said Elizabeth Bowstead, by the defendant, that is to say, on the 1st January, 1841, the father of the said Elizabeth Bowstead was dead. That at the time of the said alleged debauching and carnally knowing of the said Elizabeth Bowstead by the defendant, the mother of the said Elizabeth was the only parent of the said Elizabeth then living, and that the mother of the said Elizabeth is still living, and the defendant saith that the name of the mother of the said Elizabeth is unknown to the defendant. And he further saith, that the mother of the said Elizabeth hath, since the death of her former husband, the father of the said Elizabeth, whose name is also unknown to the defendant, and before the time of the debauching and carnally knowing of the said

Elizabeth as aforesaid, to wit, on the 2d January, 1841, intermarried with and is now the wife of one Isaac Whitfield. And the defendant in fact saith, that neither the father of the said Elizabeth in his life time, nor the mother of the said Elizabeth or her said present husband, ever at any time before or since the said debauching and carnally knowing of the said Elizabeth as aforesaid abandoned the said Elizabeth, or refused to provide for or to retain her as an inmate of his, her or their respective house or family. That the mother of the said Elizabeth and the said Isaac Whitfield last aforesaid, the husband of the mother of the said Elizabeth, were both resident within that part of the province of Canada formerly called the province of Upper Canada long before and at the time of the birth of the child of which the said Elizabeth was delivered as in the said declaration is mentioned, and that they have ever since then respectively continued and still are resident therein. And defendant avers that since the birth of the child of which the said Elizabeth was delivered as in the declaration mentioned, six lunar months from the birth and delivery of the said child have not yet elapsed, nevertheless the said plaintiff, long before the expiration of the six months from the birth and delivery of the child aforesaid, that is to say, on the seventh day of November last past, commenced this present suit against the defendant, contrary to the form of the statute in such case made and provided, although the said Elizabeth hath always been and yet is an unmarried female as aforesaid, and although she hath never at any time been abandoned, or refused to have been or be provided for or retained as an inmate as aforesaid, and although the mother of the said Elizabeth, and the husband of the mother of the said Elizabeth were each of them respectively at the time of the birth and delivery of the said child of the said Elizabeth as aforesaid, and still are, resident in this part of the province of Canada as aforesaid, and although six months have not elapsed since the birth and delivery of the said child as aforesaid, and this the defendant is ready to verify; therefore he prays judgment of the writ and declaration in this suit, and that the same may be quashed, and, &c." General demurrer to plea.

Bell, counsel for plaintiff.

A. Wilson, counsel for defendant.

ROBINSON, C. J.—I think the intention of the statute is clearly this, that where the father is dead, the mother shall be entitled to the action, wherever the daughter may be living at the time of being seduced, provided she is living in the province, and has not abandoned her daughter, or refused to receive her as an inmate. And the statute reserves to the father or mother this privilege, of suing in preference to any person not a parent for six months, after which period, if the parent has not sued the master may. It does not appear, on the record, that the Isaac Whitfield suing here, is the husband of the mother, and if it did, the mother must nevertheless be joined, in order that the action might survive to her in case of her husband's death, as being the meritorious cause of action. Our statute referred to in these pleadings (*a*), places the remedy in cases of seduction on a new footing in several respects, and it is no answer to this defendant's plea to say that what he contends for is contrary to the law of England, for the legislature has made and intended to make a

change in the law,—they considered that the real substantial injury for which the action is brought in cases of seduction, is the wound given to parental feelings, the disgrace and injury inflicted upon the family of the person seduced, and they reflected that this remedy was in practice often defeated by the inability to prove that the relation of master and servant did in truth subsist, at the moment of the trespass, between the parent and the child, by reason of the daughter being in fact their hired servant or an inmate in the family of some other person; so that a relation, which is rarely if ever made the real ground of the action, not unfrequently became the means of interfering with the real remedy which would otherwise have been in the power of the person whom the law, as it is administered in spirit, though not in form, does in truth look upon as the party injured, and this upon principles wholly apart from any actual relation of master and servant. When I read the whole act, I think I see clearly that the legislature intended not to allow, hereafter, the remedy for the real injury to be lost to the person injured, by reason of the impediment to which I have referred. The act therefore reserves to the father, if he be living, in the first place the right to sue for the seduction, and to recover, for the wrong done to him as a parent in point of feelings, credit and interest, whether his daughter was at the time of the seduction living with him or not. And in case of the death of the father, the same right is reserved to the mother, equally to the exclusion of any action for the injury by other persons, which might interfere with this remedy. If neither shall bring an action within six months from the birth of the child, then the third section of the act provides that the master, or other person who may stand in loco parentis, may bring an action, as they might have done if this act had not been passed. What the plaintiff here contends for is, that such master may, before the six months, bring his action as if this statute had never passed, but in ruling so, I conceive we should be over-ruling the clear enactments of the statute, and setting ourselves above the legislature. It may be said, that according to this construction, a master, who may suffer a real and not an imaginary loss by his female servant being seduced, will be deprived by this act of his remedy. I think we may answer that by saying, that in the first place the instances are extremely rare, of such an action being brought by a master upon his ground of service only—I do not remember one, so that if a right has been interfered with, it is one scarcely ever exercised. In the next place, if in consequence of the seduction, an expense for medical attendance, or otherwise, were thrown upon the master, I do not yet conclude that he would have no remedy for such loss, though it may be found that he would not have. But at any rate there was formerly this evil on the other side, which I have seen, namely, that the remedy of an afflicted parent was sometimes defeated by the circumstance that the girl was at the time living in the service of a master who had himself been her seducer. And this consequence of the law as it formerly stood, was incomparably a greater grievance I think, than any which the legislature may possibly have thrown upon the master, in the measure which they have passed for remedying it. At all events it seems to me that the act admits of no other construction than I have stated, and therefore I am of opinion that the defendant is entitled to judgment on this demurrer.

JONES, J.—An unmarried female not residing with her father, or under his protection, had no remedy through her father for seduction. The action must in such case have been brought by the person with whom she resided as a servant, and when the seduction was by the master, or he refused to bring any action, there was no redress. The statute 7 Will. IV, ch. 8, was passed to remedy this evil, and provides, that when the unmarried female had not been abandoned by her father or mother before the seduction, the father, or in case of his death the mother, might maintain an action, and recover damages, without proof of service; and the master of such unmarried female was restrained from bringing any action, unless the father or mother had failed to do so within six months from the birth of the child, being resident within the province. If, therefore, the father or mother should bring an action, the master perhaps cannot sustain one notwithstanding his actual loss of service, because it may not have been thought right to subject a person to an action at the suit of the father or mother, and also of the master, and further, that the injury would be less in restraining a master from bringing any action for a loss of service, than to leave a female without redress, when the seducer was the master, or when the master refused to bring any action,—the injury, in the great proportion of cases, being rather to the feelings than pecuniary.

MCLEAN, J., and HAGERMAN, J., concurred.

Judgment for defendant on demurrer.

DETGOR v. KEOGH.

Plaintiff declares on a covenant by defendant to transfer to him certain land, to which defendant was entitled as the son of an U. E. loyalist, provided plaintiff, his heirs or assigns, should locate the land, perform settlement duties, and procure the patent thereof at his or their costs, defendant in his said covenant agreeing to furnish plaintiff, his heirs or assigns, with full power and authority so to do; and then assigns as a breach, that from the time of the agreement to the commencement of the action, he (the plaintiff), has been ready and willing to locate, &c. &c., of which defendant had due notice, and though often requested, refused to furnish the plaintiff with power and authority so to do. The breach is bad, in not averring a demand of authority to locate, perform settlement duties, &c., with time and place.

Plaintiff declares in covenant, "For that whereas heretofore, to wit, on the 29th day of January, in the year of our Lord, 1834, the defendant by his writing obligatory, sealed with his seal, and now shewn to the court of our lady the Queen, before the Queen herself here, the date whereof is the day, and year aforesaid, for and in consideration of the sum of 10*l.* of lawful money of Upper Canada, to him in hand paid by the plaintiff before the delivery of the said writing obligatory, covenanted and agreed with the plaintiff to assign, transfer, convey, and assure to the plaintiff, his heirs and assigns, for ever, two hundred acres of land, which the defendant covenanted that he was then entitled to receive from the crown, as the son of Francis, an U. E. loyalist, as soon as the patent deed for the said land should be procured from the officer appointed to deliver the same, provided the plaintiff, his heirs or assigns, should locate the said land, perform the settlement duties thereon, and procure the patent thereof at his or their proper costs and charges, the defendant thereby agreeing to furnish the plaintiff, his heirs or assigns, with the full power and authority so to do." Second breach assigned: "And the plaintiff

saith further, that although he was, and his assigns were, on the day and year aforesaid, and *from thence hitherto*, to the commencement of this action, hath and have been ready and willing to locate two hundred acres of land, perform the settlement duties thereon, and procure the patent for the same at his and their proper costs and charges, of which the defendant had *due notice*, yet the defendant hath broken his covenant in this, that he hath not ever furnished the plaintiff or his assigns with full power and authority so to do, although *often requested*." Second breach demurred to : "That there is not a sufficient request alleged in the said second breach to have been made upon the defendant to furnish the plaintiff or his assigns with full power and authority to locate the two hundred acres of land, perform the settlement duties thereon, and procure the patent for the same at the costs and charges of the plaintiff; that it is not shewn in the said second breach, that the defendant offered to the plaintiff to locate the said two hundred acres of land, or to perform the settlement duties thereon, or to procure the patent for the same at his proper costs and charges; that it is not alleged whether any, or what power or authority was necessary or requisite to be furnished to the plaintiff or his assigns, to enable him or them to locate the said two hundred acres of land, perform the settlement duties thereon, or procure the patent for the same; and the defendant cannot tell, and does not know what power or authority the plaintiff requires for the purpose aforesaid, nor is it stated when or where such demand (if any were made at all) was made, or to or by whom it was made." Joinder in demurrer.

Ross, counsel for plaintiff.

Wallridge, counsel for defendant.

ROBINSON, C. J.—I think plaintiff should have averred a demand of authority to locate, to do settlement duties &c., with time and place; especially as it is to plaintiff or *his* assigns, and he may have assigned it. If a special request be not necessary, then the agreement must have been broken at once. It is clear that the plaintiff cannot complain of a breach of the agreement, to empower him to locate, and do the settlement duty, and take out a patent, unless he can shew that a reasonable time has elapsed for this being done, and yet that he (defendant) has not done it; or that, at a certain time, he requested the defendant to give him the authority, and that he refused or neglected. He asserts neither of these things: the *licet sc̄pius requisitus* will not do.

JONES, J.—The demurrs to the breaches are good, for the special reasons assigned. There is no time or place stated, when and where the request of the plaintiff to the defendant, to give the power required, was made (*a*).

MCLEAN, J., and **HAGERMAN, J.**, concurred.

Judgment for defendant on demurrer.

CRYSLER v. ELIGH.

Plaintiff sues on a bond, sets out the condition, and alleges a breach, but not a breach of the condition. The declaration is bad.

Declaration, debt on bond, conditioned "that the said defendant had for and in consideration of the sum of 6*l. 5s.* currency, (meaning of lawful money of that part of this province formerly Upper Canada, to him in

hand paid, agreed to assign, transfer, or make over unto the said John Pliny Crysler, his heirs and assigns forever, one hundred acres of land to which he was entitled as a private in the first flank company, First Stormont Militia, having served six months and upwards under Captain W. Morgan, in the last war with the United States, when and so soon as the patent for the same should be obtained from the Crown, at the proper costs and charges of the said John Pliny Crysler, his heirs or assigns; and that the said Andrew Eligh had also agreed to assign and make over unto the said John Pliny Crysler, his heirs or assigns, all benefit arising from the said one hundred acres of land when so soon as the same might be received or realized. It is declared, that if the said Andrew Eligh, his heirs, executors or administrators did and should in all things well and truly observe, fulfil, and keep the said agreement so made and entered into with the said John Pliny Crysler, then the said writing obligatory should be null and void, else to be and remain in full force and virtue." Plaintiff then avers the following breach: "That the said defendant did not well and truly observe, fulfil, and keep the said agreement so made and entered into with the said plaintiff, but on the contrary thereof, wholly refused so to do, and then and there broke the same in this, to wit, that at the time of the making of the said agreement, he, the said defendant, was not entitled to one hundred acres of land as a private having served six months and upwards in a flank company of the First Stormont Militia, under Captain William Morgan, during the last war with the United States, nor was he, the said defendant, so entitled at any time before or since, by reason whereof no patent could be obtained from the Crown for the said one hundred acres of land, or any part thereof, to wit, at Williamsburgh aforesaid. Whereby and by reason whereof the said plaintiff hath lost and been deprived of great gains and profits, and hath been put to great trouble and expense, in endeavouring to procure the issue of the patent for the said one hundred acres of land, to wit, the sum of twenty pounds of lawful money of Canada, and hath been deprived of the use, profit and advantage of the said one hundred acres of land, and all benefit to be derived therefrom, to wit, at Williamsburgh aforesaid." Defendant craves oyer of bond and condition, setting them out as above, and demurs to the breach, "That the said breach does not positively deny that the defendant was not entitled to 100 acres of land as a private having served six months and upwards in a flank company of the First Stormont Militia, under Capt. W. Morgan, during the last war with the United States, and such form of allegation amounts to a negative pregnant, as it imports that the defendant was entitled to some land, having served some time in some capacity, in some regiment, under some captain. And that the said breach is double, and puts in issue several distinct matters, namely, that the defendant was not entitled to one hundred acres of land as a private, that he did not serve six months, and that no patent ever issued for the said land; and that the several breaches are assigned together, although each allegation forms a distinct and separate breach, and ought to have been separately assigned, and for that the said breach is otherwise uncertain, informal, double, and argumentative." Joinder in demurrer.

G. Jarvis, counsel for plaintiff.

A. G. McLean, counsel for defendant.

ROBINSON, C. J.—Defendant is entitled to judgment in my opinion. It is impossible to make out a claim to the penalty of a bond otherwise than by shewing a breach of the precise condition. Plaintiff here sues on a bond, and sets out the condition, and alleges a breach, but not a breach of the condition. His declaration is therefore bad. Defendant recites, in the bond, that he had agreed to transfer to plaintiff land, to which he was entitled as a private in the first flank company of the first regiment of Stormont Militia, &c., *as soon as a patent shall be obtained* from the Crown, at *plaintiff's expense*, and he binds himself to keep that agreement. And plaintiff assigns as a breach, that defendant did not keep his agreement in this, that he was not entitled to one hundred acres of land as a private having served, &c., by reason whereof no patent could be obtained from the Crown. Now whether he was not entitled because he was not what he averred himself to be, or whether, being such militia-man, he was not entitled to land, is not stated. We cannot tell whether plaintiff means that he had deceived him, in pretending a false fact, or in setting up a right and a law or public regulation which did not exist. If he means the latter, we know that acts of parliament had been passed which interfere with the right to receive lands in such cases. And where a condition becomes impossible by act of law, the obligation is saved (*a*). But besides this objection this declaration fails, because it claims a penalty as on a breach, and shews no breach. There can be no breach of this condition till a patent has issued. Deceit might lie, or an action on an implied covenant, when the facts would support it, but not an action on the bond.

JONES, J., McLEAN, J., and HAGEMAN, J., concurred.

Judgment for defendant on demurrer.

WATSON v. SUTHERLAND ET AL.

Under the award and declaration, (as given in the statement of this case), the court held that the amount of 500*l.* awarded to be paid by quarterly instalments was stated with sufficient certainty. Also, that the thirty days' default in the payment of the instalment of 125*l.* falling due on the 10th of August, by which plaintiff became entitled to claim the sum of 375*l.* was sufficiently shewn in plaintiff's declaration. Also, that the appointment of the third arbitrator, and the extension of the time for making the award under the hands of the arbitrators, without their seals, were valid acts according to the submission.

Debt on award. Declaration: "For that whereas certain differences having arisen and being depending between the said plaintiff and the said defendants, the said plaintiff heretofore to wit on the 6th February, 1843, by a certain bond of arbitration bearing date to wit the day and year aforesaid, became bound to the said defendants in a certain penal sum in the said bond mentioned. And the said defendants then by a certain other bond of arbitration bearing date to wit the day and year aforesaid, became and were bound to the said plaintiff in a certain penal sum in the said bond mentioned, by which said bonds respectively it was recited as follows, that is to say, 'Whereas the above bounden Kenneth McKay Sutherland, and James Boag Sutherland, did, in the year 1841, and for some time previous thereto, carry on trade or business together in the said city of

(*a*) Com. Dt. condition, D. 1, 7; Co. Lit. 206, a.

Toronto, as grocers, and copartners, and did, sometime in or about the month of November in the same year, contract and agree with the said John Watson, to take him into the said copartnership from a certain day and upon certain terms and conditions in the memorandum or agreement in writing hereinafter referred to set forth and declared. And whereas, on or about the 19th of the said month of November, the said several parties made and signed a memorandum in writing between themselves, of the said agreement and of the terms and conditions of the same, (a copy whereof is hereunto annexed). And whereas the said Kenneth McKay Sutherland, and James Boag Sutherland, are desirous to put an end to and determine the said copartnership, and to exclude the said John Watson therefrom, believing that the business could not be continued with any satisfaction to the parties, nor with profit or advantage as originally contemplated and expected, in consequence whereof divers disputes and differences have arisen between the said parties, and in order to put an end to and determine the same it hath been agreed, that as well the said differences and disputes as the terms and conditions upon which the said partnership shall be dissolved, and the sum of money (if any) to be paid by the said Kenneth McKay Sutherland and James Boag Sutherland to the said John Watson, and the time and manner of the payment thereof, for and on account of his exclusion from the said copartnership, and the security (if any) to be given by them the said Kenneth McKay Sutherland and James Boag Sutherland to the said John Watson for the payment of the same, and also the indemnity to be offered to him against all the outstanding liabilities of the said copartnership, shall be referred to the arbitration of William Wakefield, of the city of Toronto, auctioneer, John McGlashan, of the same city, merchant, and of some third person to be named and appointed by them by writing under their hands before they proceed in the matters of the said reference. And it hath been further agreed that the said award, order and determination of the said arbitrators or any two of them shall be binding and conclusive upon the said parties in dispute, and shall be a rule of her Majesty's Court of Queen's Bench, at Toronto : which said bonds were respectively subject by a condition therein set forth for making the same void in the words following, that is to say, 'now the condition of the above written bond or obligation is such, that is to say, that if the above bounden Kenneth McKay Sutherland, and James Boag Sutherland, and each of them, their and each and every of their heirs, executors and administrators, do and shall, on their and his respective parts, in all things well and truly obey, abide by, observe, perform, fulfil and keep the award, order, arbitrament and determination, of them the said William Wakefield and John McGlashan and such third person to be chosen as aforesaid, or any two of them, as well of and concerning the said differences and disputes and other the matters hereinbefore mentioned, to be hereby referred, as of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, specialities, bonds, judgments, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time or times heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed or depending, by or between the said Kenneth McKay Sutherland, and James Boag Sutherland, and John Watson, so as the said award be made by the said Arbitrators or any two of them, in writing, and ready to be

delivered to the said parties in difference on or before the eighth day of February now instant, then the above written bond or obligation shall be void and of no effect. And the said Kenneth McKay Sutherland, and James Boag Sutherland, do hereby consent and agree, that for better enforcing the observance and performance of such award, their submission to the said reference or arbitration in respect of the same, shall be made a rule of her Majesty's Court of Queen's Bench, at Toronto, according to the statute in that case made and provided. And also that they shall and will produce and shew forth to the said arbitrators or any two of them, all such books, accounts, letters, evidences and writings relating to the said copartnership, and the said matters in dispute and hereby referred, as shall be in the possession of them or either of them, or of any person or persons under the controul of them or either of them, so that the said arbitrators or any two of them may examine and inspect or peruse the same, for the purpose of enabling them to make the said award. And further, that the said arbitrators, for the purpose of enabling them to make such award, shall be at liberty to go into parol and written evidence, and to examine such witnesses as they shall think proper on oath : such witnesses to be sworn before the said arbitrators or any two of them, or before a judge or commissioner for taking affidavits in the said Court of Queen's Bench. And also that it shall be lawful for the said arbitrators or any two of them, from time to time, by any writing or writings under the hands of them or any two of them endorsed on these presents, to enlarge the time for making their award in the said matters hereby referred, so as the last extension of time for making the said award do not exceed the tenth day of February now instant. And also that it shall be lawful for the said arbitrators, or any two of them, to proceed ex-parte in the said several matters so referred to them, in case of the non-attendance of the said parties to the said reference, after one day's previous notice in writing being given to them respectively, or left at their respective usual place of abode, for that purpose. And lastly, that all costs and charges attending the said arbitration shall be at the discretion of the said arbitrators, or any two of them, and shall be paid and satisfied pursuant to the said award, and that they the said Kenneth McKay Sutherland, and James Boag Sutherland shall not, nor shall either of them bring any action, or commence any suit against the said John Watson in relation to the premises or against the said arbitrators, or any of them, unless fraud or collusion be discovered in the said award. In witness whereof the said parties to these presents have hereunto set their hands and seals, the day and year first above written.' And the said plaintiff further saith, that the said William Wakefield and John McGlashan in the said bonds mentioned did, after the making of the said bonds respectively, and before they proceeded in the matters of the said reference, to wit, on the same day and year aforesaid, by writing under their hands, bearing date the day and year last aforesaid, name and appoint one Thomas Denny Harris as such third person to proceed with them the said William Wakefield and John McGlashan in the matters of the said reference, according to the terms and conditions of the said bonds respectively. And the said plaintiff further saith, that the said William Wakefield, John McGlashan, and Thomas Denny Harris, having met upon the said reference, and not being able to make their award between the said parties by the time mentioned

in and limited by the condition of the said bonds respectively, afterwards, and before that time to wit on the seventh day of February in the year aforesaid, by writing under their hands, endorsed upon the said bonds respectively, enlarged the time for making their award, of and concerning the matters thereby referred, to the said 10th day of February in the year last aforesaid. And that said plaintiff further saith, that the said William Wakefield, John McGlashan, and Thomas Denny Harris, having taken upon themselves the burthen of the said arbitration, did in due manner, and within the time for that purpose appointed as last aforesaid, to wit, on the said tenth day of February, 1843, duly make and publish their award in writing, of and concerning the said matters in difference between the parties, ready to be delivered to the said parties in difference, or such of them as should desire the same, and bearing date to wit the day and year last aforesaid, and did thereby amongst other things award, order and determine, that the said defendants, their executors and administrators, should pay or cause to be paid, unto the said plaintiff, his executors or administrators, the full sum of 500*l.* of lawful money of Canada, by four even and equal quarterly payments or instalments, on the tenth day of May then next ensuing and now last past, and the tenth day of August then next ensuing and now last past, the tenth day of November then next ensuing and now last past, and the tenth day of February which would be in the year of our Lord 1844, to wit, February now instant, the first payment thereof become due and payable and to be paid on the tenth day of May then next ensuing and now last past. And the said William Wakefield, John McGlashan, and Thomas Denny Harris, did thereby further award, order and determine, that in case default should be made in payment of the said quarterly payments and instalments, or any or either of them, or any part of them, or any or either of them, on the days or times thereinbefore appointed for payment thereof, and the same should not be paid by the space of thirty days next after any or either of the said days of payment, then that it should and might be lawful for the said plaintiff, his executors, administrators or assigns, to take all legal and necessary steps to enforce the payment of the said sum of 500*l.*, or such part thereof as shall then remain due and unpaid. And the said plaintiff further saith, after the making of the said award, and before the commencement of this suit, to wit, on the 10th August, 1843, the sum of 125*l.* of lawful money aforesaid, being one even and equal quarterly payment in the said award mentioned, became and was due and payable, and should and ought to have been paid by the said defendants to the said plaintiff, according to the tenor, effect, true intent and meaning of the said award, but that the said defendants, or either of them, did not nor would pay the same, or any part thereof, or cause the same or any part thereof to be paid to the said plaintiff, but therein wholly failed and made default, nor was the same or any part thereof paid to the said plaintiff by the said defendants, or either of them, or any person on their behalf, by the space of thirty days next ensuing the said tenth day of August hereinbefore last mentioned, and the same still remains wholly due and unpaid to the said plaintiff. And the said plaintiff saith, that at the time of such default as last aforesaid, to wit, on the said tenth day of August in the year last aforesaid, the sum of 375*l.* of lawful money aforesaid, parcel of the said sum of 500*l.* in the said award mentioned, and thereby directed

to be paid by the said defendants to the said plaintiff, was due, in arrear and unpaid by the defendants to the plaintiff, and from thence hitherto hath been and still is due, in arrear and unpaid. Whereby an action hath accrued to the said plaintiff, to demand and have, of and from the said defendants, the said sum of $375l.$ above demanded. Yet the said defendants have not paid the said sum above demanded, or any part thereof, to the plaintiff's damage of $50l.$, and therefore he brings his suit, &c. Demurrer to declaration: For "that the averment in the said declaration, that the arbitrators did by such award 'amongst other things award, order and determine, that the said defendants, their executors and administrators, should pay or cause to be paid unto the said plaintiff, his executors or administrators, the full sum of $500l.$ of lawful money of Canada, by four even and equal quarterly payments or instalments, on the 10th day of May then next ensuing and now last past, the 10th day of August then next ensuing and now last past, the 10th day of November then next ensuing and now last past, and the 10th day of February, which would be in the year of our Lord 1844, to wit, February now instant, &c.', is uncertain and ambiguous in this, that it does not shew what precise sum was to be paid by said award, on the said respective days and times above mentioned, nor does it appear thereby or by the said declaration what was the amount or sum of each instalment or payment, nor is it alleged or shewn (except inferentially) whether the sum of $500l.$ is the instalment or quarterly payment therein mentioned, or the principal sum awarded. And further, that it wants sufficient certainty and is defective in this, that the amount of the sum or sums awarded, and the amount of each quarterly payment or instalment, is not averred or shewn with certainty or precision, and that the said declaration is repugnant and inconsistent in this, that after setting forth that the said sum of $500l.$ is to be paid by four even and equal quarterly payments, on the 10th day of May, on the 10th day of August, on the 10th day of November, and on the 10th day of February, as above set forth, and averring that on the 10th day of August, in the year of our Lord 1843, the sum of $125l.$, being one even and quarterly payment, became and was due and payable according to the said award; yet it is afterwards alleged, that on the said 10th day of August, the sum of $375l.$, parcel of the said sum of $500l.$, was due, in arrear and unpaid, and from thence had been and still was due and unpaid, &c. And also for that it is averred, that in default of the payment of the said quarterly payments or instalments, or any of them, on the days and times therein mentioned, and the same should not be paid for the space of thirty days next after any of the said days, that then it should be lawful for the said plaintiff to enforce the payment of the sum of $500l.$; yet said declaration avers, that on the 10th day of August, the sum of $125l.$, being one instalment, became due; and then avers, that the sum of $375l.$ became due on said 10th day of August, whereas the said thirty days above mentioned is not shewn to have elapsed, and it is not shewn how the said $375l.$ became due, and is repugnant to and at variance with the other averments above mentioned relative to the payment of the said money; and also for that it is in and by the said declaration averred, that the said arbitrators, William Wakefield and John McGlashan, did by writing under their hands appoint Thomas Denny Harris as a third person, and it is not averred or shewn that such writing

or appointment was under the seals of the said arbitrators, or that they were empowered by an instrument of sufficient power to vary and alter the tenor and effect of the said bond. And also for that it is averred and stated, that the arbitrators not being able to make their award by the 8th day of February, the day mentioned in the condition of the said bond, by writing under their hands endorsed upon the said bonds respectively, enlarged the time for making their award, and does not state that such enlargement, indorsation or writing, was under the seals of the said arbitrators, or that it was of sufficient power to alter or extend the time mentioned in said bond, or to operate as a defeazance thereof, and also for that it is averred under a videlicet at what time the sum of 125*l.* became due, as 'to wit, the 10th day of August, in the year of our Lord 1843, 125*l.* became and was due,' whereas the time there mentioned is a material and traversable allegation, and should have been alleged positively, and also for that the time when the sum of 375*l.* became due and payable is not stated certainly, but under a scilicet, as 'to wit, the 10th day of August, in the year last aforesaid, the sum of 375*l.*, &c.,' became and was due, instead of being alleged with certainty, and the thirty days' default mentioned in the said declaration is set forth, after stating the time wherein the payment became due, under a videlicet, and not stated positively. And also for that there is no cause of action whatever stated or alleged in the said declaration against the said defendants, and also for that it is uncertain from the said declaration whether the said action is brought upon the said arbitration bonds mentioned therein, or on the award alleged to be made thereon, and that the said declaration is in other respects uncertain, informal and insufficient. Joinder in demurrer.

Duggan, counsel for plaintiff.

Crooks, counsel for defendant.

ROBINSON, C. J.—I am of opinion that the declaration is sufficient in this case. The arbitrators are expressly empowered to enlarge the time by writing without seal. The sum of 500*l.* is explicitly awarded to be paid in four even and equal quarterly payments, to fall due on certain days named; there is no uncertainty as to the amount of each payment; "id certum est quod certum reddi potest." The declaration clearly claims 375*l.* as being due after thirty days had expired from the time the second instalment was unpaid, and so it would be. It is clearly said that thirty days had elapsed, and that afterwards, to wit, the 375*l.* became due under the award the 10th August following: that must be rejected as surplusage, especially coming as it does under a videlicet. The cases cited from 3 T. R., 592, do not bear against this action; and the case of *Evans v. Thompson*, 5 E. R., 191, shews, that in that case an action could have been well sustained on the bond, as no doubt it might; then clearly it can be on the award.

JONES, J.—I think the plaintiff entitled to judgment upon the demurrer. In my opinion the amount of 500*l.* awarded to be paid by quarterly instalments is stated with sufficient certainty; and the thirty days' default in the payment of the instalment of 125*l.*, which fell due on the 10th of August, is clearly shewn, by which the plaintiff became entitled to claim the full amount then unpaid, being 375*l.* The appointment of the third arbitrator, and the extension of the time for making the award, under the hands of the arbitrators, without their seals, were valid acts, according to

the submission, such appointment and extension of time not being required to be under the seals of the arbitrators as objected. The time at which the instalments unpaid became due (to wit, on the 10th of August) is sufficiently stated under a videlicet. If such time was material, and was mis-stated, the defendant could take advantage of it by pleading. (a)

MCLEAN, J., and HAGEMAN, J., concurred.

RUSSELL ET AL. v. ROBERTSON.

The exception in the statute of limitations extends only to actions of *account*, not to actions of assumpsit on *open accounts*.

Declaration, assumpsit on common counts; plea that the cause of action did not accrue within six years before the commencement of the suit; replication, "that the causes of action relate to accounts between the parties as merchants." To this defendant demurs that the exception in the statute does not apply to this form of action.

J. A. McDonald, counsel for plaintiffs.

Blake, counsel for defendant.

ROBINSON, C. J.—We are bound by the judgment given on great consideration in *Inglis v. Raigh* (b), to hold that the exception in the statute 21 Jac. 1, extends only to actions of account, not to actions of assumpsit on open accounts; and there was much authority before this case to support that opinion (c), though undoubtedly it had in several cases been otherwise held, and before the late case of *Inglis v. Raigh*, might have been considered an unsettled point.

JONES, J.—The case of *Inglis and another v. Raigh* (d), is a clear authority against the plaintiff; the decision there is, after reviewing the former cases upon the question, that the exception in the statute as to merchants' accounts, does not apply to an action of indebitatus assumpsit, but only to the action of account, or to an action on the case for not accounting. And when we look at the words of the statute, "all actions of account, and upon the case, other than such as concern the trade of merchandize, between merchant and merchant, their factors, or servants," this must be regarded as the true construction. It is however strange, that the question should not have been fully settled in England at an earlier day than in the year 1841.

MCLEAN, J., and HAGEMAN, J., concurred.

MORLEY ET AL. v NICHOLS.

One count, in a declaration for slander, states a cause of action accruing to plaintiffs as partners, by reason of its being an injury to them in their joint business; other counts in the same declaration charge defendant with imputing forgery to plaintiffs, as partners, &c., the imputation of forgery not being a partnership imputation, the declaration is bad for misjoinder of counts. Words alleged to have been spoken cannot be amplified in their meaning by unwarranted inuendoes.

Action for slander; declaration, 1st count, states that plaintiffs, being partners in trade, and in course of business, drew in the name of the firm

(a) Chitty, Pleading, 2d Edition, 308, and the authorities there cited.

(b) 9 Dowl. 826. (c) 2 Saund. 124. (d) 9 Dowl. P. C. 817.

a promissory note for 250*l*, payable to one Edward H. Hardy, or order, at the Commercial Bank; that one Counter endorsed the note, and that by virtue of the said note so endorsed the plaintiffs obtained from the mayor and common council of the town of Kingston a loan of money for their use in their said trade and business; that defendant, knowing the premises, and wishing it to be believed that plaintiffs had been and were in bad and insolvent circumstances, on the 8th of November, 1844, in a certain discourse which the defendant had with the said Edward H. Hardy, of and concerning the plaintiffs, and of and concerning them in the way of their trade and business, and of and concerning the said note, and said loan of money so obtained by virtue thereof, falsely and maliciously spoke and published in the presence and hearing of the said Edward H. Hardy, of and concerning the plaintiffs, and of and concerning them in the way of their aforesaid trade and business, and of and concerning the said note, and the said loan of money so obtained by virtue thereof, the false, scandalous, malicious, and defamatory words following, that is to say, "How are you (meaning the said Edward H. Hardy,) going to get out of the trouble you (again meaning the said Edward H. Hardy,) are in about the Corporation loan?" (meaning the said loan so obtained by the plaintiffs as aforesaid,) thereby meaning that the said Edward H. Hardy was in trouble by reason of his endorsing the note aforesaid, and that the plaintiffs were insolvent and could not pay the same. Second count states, that plaintiffs, upon other promissory notes, negotiated for and obtained from the mayor and common council of the town of Kingston, a certain other loan of money for the use of them the said plaintiffs in their said trade and business; that defendant, well knowing, &c., in a certain other discourse which he the defendant had in the presence of divers persons, of and concerning the plaintiffs, and of and concerning the said last mentioned notes, &c., and of and concerning the said loan so obtained by the said plaintiffs by virtue of the said last mentioned note, falsely, &c. spoke and published, of and concerning the said plaintiffs, and of and concerning the last mentioned notes, &c., and of and concerning the said loan, the false, &c. words following, that is to say, "From conversation I (meaning the defendant) had with Mr. Hardy (meaning the said Edward H. Hardy), I (again meaning the said defendant) do not believe Mr. Hardy (again meaning the said Edward H. Hardy) endorsed those notes (meaning the said promissory notes in this count mentioned); there is something wrong about them" (again meaning the said promissory notes in this count mentioned); thereby meaning that the name of the said Edward H. Hardy so endorsed upon the last note in this count mentioned, had been forged thereupon, and that the said plaintiffs had committed the crime of forgery. Third count states the same as in second count, except that the words are charged so as to convey the imputation that the plaintiffs got the loan on the note knowing the name of the endorser to be forged. Fourth count, inducement same as last count, words charged somewhat different, conveying the same imputation. Fifth count, inducement and words same as fourth counts, charge conveyed that plaintiffs procured the loan on the note knowing the name of endorser to be forged. General damage to plaintiffs in their said trade and otherwise.

To this declaration defendant demurs, first, that there is an improper joining in declaration of rights of action in this, that the first count states

an injury done to plaintiffs in trade as partners, while the four remaining counts shew cause of actions not affecting the joint interest, and for which injury each plaintiff has a separate action; secondly, that the words alleged to have been spoken are not actionable *per se*; and thirdly, that the inuendoes are not supported by the inducements or by the words laid in the several counts. Joinder in demurrer.

Breakenridge, counsel for plaintiffs.

J. A. McDonald, counsel for defendant.

ROBINSON, C. J.—I am of opinion that this declaration is bad, for the misjoinder. The first count states a cause of action accruing to Morley and Jenkins, as being partners, by reason of its being an injury to them in their joint business. The other counts are for imputing forgery, which can only be to the person or persons who committed it. It is no partnership imputation, and can produce no joint damage. The counts are also bad as amplifying the import of the words by unwarranted inuendoes.

JONES, J.—The words “How are you going to get out of the trouble you are in about the Corporation loan?” with reference to the inducement, do not warrant the inuendo laid, that the plaintiffs were insolvent and could not pay the note referred to in the inducement. It does not appear that they were in any trouble, and if they were, what was it? the note is not stated to have been due, or that the plaintiffs could not pay it at maturity. The second count charges the defendant with uttering words meaning to charge the plaintiff with forgery. This cause of action being several and individual, could not be sued for jointly by the plaintiffs, nor joined in a cause of action for words injurious to them in their trade or business.

MCLEAN, J., and HAGEMAN, J., concurred.

Judgment for defendant on demurrer.

GRACEY v. WILSON, EXECUTOR.

To an action of assumpsit on the common counts against an executor on his testator's promise, defendant pleads a set-off, due to him from plaintiff, for goods sold, money paid, by defendant as executor of the testator, to plaintiff. The plea is bad: defendant attempting to set-off an individual debt against a demand due from him in his capacity of executor.

Declaration; assumpsit on common counts, for work and labour, &c. performed by plaintiff for defendant's testator. Plea: a set-off, for goods sold and delivered, money paid, to plaintiff, by defendant as executor. Demurrer: that the subject of set-off not being due to the testator, is not pleadable in this action. Joinder in demurrer.

Eccles, counsel for plaintiff.

Campbell, counsel for defendant.

ROBINSON, C. J.—The plaintiff is entitled to judgment. This is an attempt to set-off debts due to defendant in his individual capacity, against a demand brought against him as executor. It is true the defendant says the goods sold and money paid by him to plaintiff were sold and paid by him as executor of the testator, Phelps, but they are nevertheless on the same footing as his individual debts, being transactions of his own, and not of his testator's. (a)

(a) Willes, 264, n.

MEAD ET AL. v. HENDRY.

Where the conditions of a sale are stated in the declaration as being imposed *at the time of the sale*, the defendant cannot be discharged from his obligation to perform them, by alleging in his plea any agreement *before the sale*. The plea containing such a defence is bad on general demurrer.

Assumpsit. "For that whereas the said plaintiffs heretofore, to wit, on the 18th May, 1843, at Kingston, in the said district, put up and exposed to sale by public auction, in lots, amongst other goods and merchandize, a large quantity of groceries, wines and liquors, to wit, *two jars*, &c., then lying and being at a certain warehouse situate and being at Kingston aforesaid, under and subject to the following conditions of sale, that is to say: that for all purchasers under the sum of 25*l.* cash would be required, and all purchasers over and above the said sum of 25*l.*, three month's credit would be given, on furnishing approved endorsed notes to one Nicholas J. Coons, and that any person purchasing and not complying with the conditions of the sale, the articles would be resold at the risk of purchaser: of all which said conditions of sale and premises the defendant, at the time when the said goods and chattels were so put up and exposed to sale as aforesaid, to wit, on the day and year aforesaid, had notice. And the said plaintiffs in fact say, that upon the said exposure to sale as aforesaid, to wit, on the 18th May aforesaid, the said defendant became and was the highest bidder for, and was declared to be and became the purchaser of a certain parcel of the said goods and merchandize so put up and exposed to sale, to wit, one jar, &c., under and subject to the said conditions as aforesaid, at and for certain prices amounting to a larger sum of money than 25*l.*, to wit, the sum of 100*l.* then and there bid by the said defendant for the same, and thereupon afterwards, to wit, on the day and year aforesaid, in consideration of the premises, and also in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there undertaken and faithfully promised the said defendant to perform and fulfil all things in the said conditions of sale contained, on the part of the vendors, to be performed and fulfilled, he, the said defendant, undertook and then and there faithfully promised the said plaintiff to perform and fulfil every thing in the said conditions of sale, on his part and behalf as such purchaser as aforesaid, to be performed and fulfilled; and although the said plaintiffs were always, from the time of the said putting up and exposing to sale of the said goods and merchandize as aforesaid until the 18th July in the year aforesaid, ready and willing to permit and suffer, and would have permitted and suffered, the said defendant to take and receive the said goods and merchandize so purchased by him as aforesaid, on payment of the said purchase money for the same, or furnishing approved endorsed notes to the said Nicholas J. Coons, and the said goods and merchandize were all that time lotted out for him the said defendant; and although the said plaintiffs have always from the time of making their said promise and undertaking hitherto well and truly performed and fulfilled the said conditions of sale in all things therein contained on their part and behalf as the sellers of the said goods and merchandize, to be performed and fulfilled as aforesaid; and although he, the said defendant, in pursuance of the said conditions of sale, ought to have cleared away and paid for, or furnished approved endorsed notes to

the said Nicholas J. Coons, for the said goods and merchandize so put up and exposed to sale as aforesaid. Yet the said plaintiffs in fact say, that the said defendant, although often requested, did not, nor would, at any time after clear away, or pay, or give notes to the said Nicholas J. Coons, for the said goods and merchandize, or any part, according to the said conditions of sale and his promise and undertaking so by him made as aforesaid, but on the contrary thereof, he, the said defendant, suffered and permitted the said goods and merchandize to remain uncleared for the space of two months after the said day of sale thereof to him as aforesaid, without paying for the same, or furnishing approved endorsed notes to the said Nicholas J. Coons, according to the true intent and meaning of the said conditions of sale, whereby the said plaintiffs necessarily incurred a great expense, to wit, the sum of 10*l.*, in keeping the said goods and chattels, and in endeavouring to procure the completion of the said contract by the said defendant on his part, and thereupon afterwards, and whilst the said goods and merchandize remained uncleared and unpaid for as aforesaid, to wit, on the 18th July aforesaid, they, the said plaintiffs, according to the said conditions of sale, and in pursuance thereof, resold the same, that is to say by public sale, at and for a much less price or sum than the said price or sum for which the same had been so sold to the defendant, to wit, for the sum of 50*l.*, whereby there then and there was a deficiency between the said price or sum for which the said goods and merchandize were so sold to the said defendant, and the said price for which the same were so sold on such resale, amounting to a large sum of money, to wit, the sum of 50*l.*, over and besides the charges attending such resale, amounting to a certain other sum of money, to wit, the sum of 10*l.*, and over and above the aforesaid charge for keeping the said goods and chattels, and making, together with the sum of 50*l.*, the sum of 70*l.* of lawful money of Canada; of all which said several premises the said defendant had notice, and was then and there requested by the said plaintiffs to pay them the said sum of 70*l.*, and which said sum of 70*l.* he, the said defendant, then and there ought to have paid to the said plaintiffs according to the said conditions of sale and his said promise and undertaking so by him in manner and form aforesaid made.

Plea: "That shortly before the sale in the said declaration first mentioned, to wit, on the 18th May in the year aforesaid, it was agreed, by and between the said defendant and the said Nicholas J. Coons, that he, the said Nicholas J. Coons, should and would take, in full payment and satisfaction of the amount or price of the goods and merchandize which he, the said defendant, should or might purchase at the said first mentioned sale, the promissory note of him, the said defendant, dated on the day of the said first mentioned sale, payable three months after the date thereof, and endorsed by one Hugh Calder. And the said defendant avers, that it was on the faith of the said agreement that he became the bidder for and the purchaser of the goods and merchandize at the said first mentioned sale, as in the said declaration is alleged. And the defendant further avers, that immediately after the said first-mentioned sale, to wit, on the 18th day of May, in the year aforesaid, he, the said defendant, offered and tendered to the said Nicholas J. Coons the promissory note for the amount of the said defendant's purchases at the said first-mentioned sale as aforesaid, to wit, for the sum of £100,

dated on the said 18th day of May aforesaid, drawn by the said defendant, payable three months after the date thereof to the order of the said Hugh Calder, and by him duly endorsed; and then and there demanded the said goods and merchandize which he had so bid for and purchased at the said first-mentioned sale, and was then and there willing and offered to carry away and remove the goods and merchandize which he had so purchased as aforesaid, and in all other respects to comply with, and perform all other things on his part, by the said conditions of sale to be complied with and performed; but that he, the said Nicholas J. Coons, notwithstanding the said agreement which he had so made with the said defendant as aforesaid, and in contravention thereof, then and there refused to accept the said promissory note so drawn by him, the said defendant, and endorsed by the said Hugh Calder as aforesaid, in payment or satisfaction of the amount of the price of the said goods and merchandise he had so bid for and purchased as aforesaid, and then and there refused to deliver to him, the said defendant, the said goods and merchandise, and was not ready or willing, nor would he comply with, or perform the agreement he had so made as aforesaid; and this the defendant is ready to verify, &c."

J. H. Cameron, counsel for plaintiffs.

Burns, counsel for defendant.

ROBINSON, C. J.—The replication is given up. The declaration, I think, states a good cause of action for, at least, part of the damages claimed. The plea, I am of opinion, is bad; whether as being only an answer to part, while it professes to answer the whole, I cannot say, because on this transcript of the pleadings I do not see what it does profess to answer. But it is bad, I think, for relying on that as a defence which is no defence. The conditions of sale are stated as being imposed *at the time of sale*. Then, if so, the defendant cannot be relieved from the obligation to perform them by any agreement made before, like the alleged agreement between him and Coons. I think the conditions of sale import that plaintiffs were to approve of the notes, and not Coons, to whom approved notes were to be merely *furnished*; but, if the condition was that Coons was to approve, still such notes were to be furnished as he *would* approve of, not as he *had* approved of. If the defendant made his purchases in consequence of a previous understanding with Coons, that his note endorsed by Calder would be received for whatever he might buy; and if, after the sale, Coons refused to accept what he had before promised to accept, that would furnish, I think, fair matter of consideration, to be urged to a jury in mitigation of damages, as shewing that the defendant was not trifling with the plaintiffs; but such *previous* agreement could not alter the legal effect of the words of the condition of sale as set out, which are prospective, and which require notes to be furnished to Coons for the amount of sales, such as, when tendered, would be approved and accepted. The utmost that can be said here, is, that Coons promised to accept such a note, and after it had been created would not accept it. The note never was approved by Coons; and I cannot hold that, in this transaction, all control by the owners of the goods was to be excluded, so that they could give no instructions to Coons, as to whom he might accept and whom not; but, if a conversation before the sale, by a proposed purchaser with Coons, must have the effect which this plea assumes, such control

would be wholly excluded, and not only the owners of the goods, but Coons himself, would be disabled from making use of whatever information they might acquire up to the time of the sale, and the tender of the notes, as to the solvency of parties. I do not see upon this plea, that Coons was anything more than an agent between the owner of the goods and the buyers, who was to receive for them such notes as he in his own judgment (liable to be controlled by them, as the parties beneficially interested) might think it safe to accept. Coons might have been the owner of the goods, and the plaintiffs auctioneers, selling them for him, for all that is stated; the declaration on that point is obscure, but I think the more natural inference, from the facts as they are stated, is, that the plaintiffs' goods were sold, and that Coons was merely appointed to be the holder, for them, of approved notes. Take it in either way, however, I am of opinion that the purchaser was bound to furnish, after the sale, notes which, when furnished, should be approved of; and, if he had not done this, he has failed in complying with the conditions of sale. The plaintiffs, in my opinion, are entitled to judgment on this demurrer.

JONES, J., McLEAN, J., and HAGEMAN, J., concurred.

McKENZIE v. CAMPBELL.

The corporation of the city of Toronto have power, from time to time, at their discretion, to make bye-laws, by which dogs found running at large within the limits and liberties of the said city, after proclamation of such bye-laws, may be shot.

Plaintiff declares in trespass for killing his dog, on 10th February, 1844. Defendant justifies as a constable of the city of Toronto; setting out, that on 27th May, 1836, the mayor, aldermen, and commonalty of the city duly met in council, according to the form of the statute, and being so met in council, did, under and by virtue of the statute in that behalf (4 Will. IV., ch. 23, sec. 21), make a bye-law, "that at any time hereafter, upon a resolution of the common council, it should be the duty of the mayor of the city to issue his proclamation, requiring the owners of all dogs, within the city and liberties, to keep their dogs confined for a period in his discretion; and that upon such proclamation being issued by the mayor, for preventing dogs or bitches running at large in the city or liberties thereof, it should and might be lawful to and for the high bailiff, constables, or any inhabitant of the city or liberties to shoot, or cause to be shot, any dog or bitch so found running at large, until the time limited in the said proclamation should expire. The plea then avers, that this bye-law was sealed by the mayor with the seal of the city, and duly published in the Upper Canada Gazette, according to the statute; and that, on 5th February, 1844, the mayor, aldermen, and commonalty of the city, duly met in council according to the statute, and being so met by virtue of the said statute and bye-law, it was resolved by them, "that whereas it appeared certain one or more cases of hydrophobia had then recently occurred within the city, whereby life had been lost, and immediate steps ought to be taken to prevent the spread of so dreadful a malady; that the mayor of the said city should be requested to issue his proclamation, requiring all owners of dogs and bitches to have the same secured from running at large for such a period

as he might deem necessary ;" that Henry Sherwood, then and still being the mayor of the city, under the said bye-law and resolution did on the said 5th of February issue his proclamation, by which he required all owners of dogs, &c., within the city of Toronto and liberties, to keep the same confined and properly secured from running at large within the city or liberties until the 1st May then next ensuing. The plea then avers that this proclamation was duly published, and that plaintiff then had notice thereof ; and that after such publication, and on the said 5th of February, the plaintiff's dog was unlawfully, and contrary to the proclamation and bye-law, running at large in the city of Toronto, wherefore defendant, being a constable of the city, and duly acting under the bye-law, before the 1st May, and while the proclamation was in full force, shot and killed the said dog while he was so running at large. The plaintiff demurs specially to this plea ; assigning for cause that the mayor, alderman, and commonalty had no power to make such a bye-law ; that the bye-law is not stated to have been made according to the statute, nor to have been passed by the mayor, aldermen, and commonalty of the city, in common council assembled ; that it is not averred that the bye-law was enrolled, nor that the defendant shot the dog within the city or liberties ; that the plea has no proper or formal conclusion.

Draper, Q. C., counsel for plaintiff.

H. J. Boulton, counsel for defendant.

ROBINSON, C. J.—The question whether this defence be good in substance depends on the enactments of the statute, 4th Will. IV., ch. 23, incorporating the city of Toronto ; the act passed in 7 Will. IV., ch. 39, amending that statute, contains no provisions which can affect the question. Of the first statute, 4 Will. IV., ch. 23, the 20th, 21st, 22nd, and 48th clauses, alone have any bearing upon the points raised by the demurrer. The 20th clause enacts that the legislative power of the city of Toronto shall be, and is thereby vested in the mayor, aldermen, and common councilmen, who together shall form the common council of the said city ; the 21st clause enacts "that every legislative act of the city shall be expressed to be enacted by the mayor, aldermen, and commonalty of the city of Toronto, in common council assembled." The 48th clause provides, "that immediately after any act shall be passed by the common council, it shall be signed by the mayor, and sealed with the seal of the city, and *enrolled*, and *such act shall thenceforth* go into effect as a law of the city of Toronto." The 22nd clause is that which defines the objects of the legislative power conferred upon "the mayor, aldermen, and commonalty," and it gives them "full power and authority from time to time, to make, revise, alter, amend, administer, and *enforce such laws as they may deem proper*," for a great number of purposes enumerated in this clause, among which are these—"to regulate or restrain cattle, horses, sheep, goats, swine, and other animals, geese, or other poultry, from running at large within the limits of the said city, or the liberties thereof, and to prevent and *regulate the running at large of dogs, and to impose a reasonable tax upon the owners or possessors thereof* ; to prevent the immoderate riding or driving horses, or other cattle, in any of the public highways of the city or liberties ; to prevent the leading, riding, or driving horses or other cattle upon the side-walks of the streets, or other improper places ; to prevent or regulate bathing and swimming in

and about the docks, &c.; to regulate or prevent the fishing with nets, &c.; to adopt and establish all such regulations for the prevention and suppression of fires, and the pulling down of adjacent houses, for such purpose, as they may deem necessary or expedient: to provide for the health of the city and the liberties thereof; to regulate the police of the city." I have enumerated several objects having no immediate connection with the particular subject in discussion, either because arguments were founded upon them; or because they seem to throw light upon the extent of the powers intended to be committed to the corporation. At the conclusion of the 22nd clause are these words, "and generally to make all such laws as may be necessary and proper for carrying into execution the powers hereby vested, or hereafter to be vested in the said corporation, or in any department, or office thereof, for the peace, welfare, safety, and good government of the said city and the liberties thereof, as they may from time to time deem expedient, such laws not being repugnant to this act, or to the general laws of this province: provided always, that no person shall be subject to be fined more than 5*l.*, or to be imprisoned more than thirty days for the breach of any bye-law or regulation of the said city." By the 72nd clause, power is expressly given to the clerk of the market to seize and destroy all weights and measures which are not according to the established standard, and to seize and destroy any meat exposed to sale in the market, which may be tainted or unfit to eat. The main question in this case is, whether the mayor and commonalty of this corporation were authorised by their charter to make such a bye-law as that under which this defendant justifies? Could they legally enact, that whenever the common council shall by resolution require it, the mayor may issue a proclamation, calling upon all owners of dogs to keep them confined until after a certain day; and that upon such proclamation being issued, if any dogs shall be found afterwards, and within the period, running at large in the city, contrary to the proclamation, the constables, or any inhabitant of the city, may shoot them? This question has seemed to us not free from doubt. There is much force in the arguments which have been urged on both sides. There is a case of *Vaughan v. Atwood and others*, reported in 1 Mod. 202, in which trespass was brought for taking away some beef from the plaintiff, being a butcher. The defendants justified, not as in this case, under a bye-law of a corporation, having extensive power of legislation given to them by statute, but by virtue of a custom of a manor, that two surveyors, chosen annually, should inspect the meat exposed to sale within the manor, and that by the custom they had power to destroy whatever unwholesome meat they found exposed to sale; and they pleaded that they were surveyors duly chosen, and in the discharge of their office seized and burnt the meat, being corrupt and unwholesome. North, C. J., said, "this is a case of great consequence, and seems doubtful. It were hard to disallow the custom, because the design of it seems to be for the preservation of men's health; and to allow it were to give men too great a power of seizing and destroying other men's goods." The other three judges, however, supported the justification pleaded. "It is (they said) a good and reasonable custom: it is to prevent evil, and laws for prevention are better than laws for punishment." So the defendant had judgment, though the chief justice, it is stated in another report (2 Mod. 56), "was

not clear in it." The same considerations which are but shortly hinted at in this case, apply in a measure to the question before us, though clearly the difference of circumstances is such as to make the decision of little value as a direct authority in determining this case. Whenever it becomes a question whether an alleged custom is to be allowed, or disallowed, it is material to consider whether it is, or is not, a reasonable custom; but here is an act done which it is attempted to justify under a bye-law of a corporation of recent origin, whose legislative powers depend on no customs but are defined in an act of parliament, and whether this bye-law is one which the corporation had power to make, cannot turn upon the mere question whether it is a reasonable or unreasonable bye-law: this bye-law clearly would have force, if the provincial statute had in express terms allowed the mayor and commonalty to make it. Now we must consider, on the one hand, *first*, that the statute creating this corporation, does not expressly give power to the mayor and commonalty to make a law or regulation authorising dogs to be shot, or in any manner destroyed; *secondly*, that the statute does not contain any express provision for guarding against the particular evil of canine madness—nothing whatever is said in it on the subject of mad dogs; *thirdly*, that it is not pretended in the defendant's plea that the dog in question was mad, or that there was any reason to suppose he was. Then, as all must turn upon the point, whether it is in the eye of the law reasonable that the power to pass bye-laws authorising the shooting of dogs, as pleaded in this case, shall be held to be intended in any of the powers which are given in the statute; we have to consider, on the other hand, *first* (and this, I think, is not immaterial), that, in view of the common law, dogs of all sorts had no intrinsic value, and the owner was held to have but a bare property in them; so that the stealing a dog is not larceny, and was not indeed a criminal offence till it was made so by statute passed in 10 Geo. III. c. 18—I only refer to this as furnishing an argument that, considering the low estimation in which the common law holds this species of property, we ought not to allow an over scrupulous regard to it to stand in the way of public safety by restraining the construction of general powers given by the statute, in such a manner as would prevent the law from being enforced so as to ensure the object which we must suppose to have been in view. Then, *secondly*, we must consider that, although the legislature have not in their act (4 Will. IV. ch. 23) announced it, we cannot but know that the principal object of restricting dogs from running at large in a city is the consideration of the very imminent danger to the community of the horrible affliction of hydrophobia spreading to a fatal extent, and with great rapidity, unless instant measures are taken to prevent it. It is not that dogs are likely to commit injuries to fields and gardens, such as may be apprehended from cattle or swine, nor that they are in the same sense a nuisance on account of their making the streets unclean and offensive, for we see that where there is not the particular danger alluded to, which cannot be too much dreaded, and which by mankind in general is indeed regarded with an almost superstitious terror, it is common to find dogs allowed to wander about towns at will, though possibly there may be exceptions to this in the general regulations of some very populous cities. We are at liberty thence to infer, and I think we must judicially recognise, that one object at least, if not

clearly the greatest or the only object, the legislature had in view when they allowed the mayor and commonalty to prevent and regulate the running at large of dogs, was to protect the lives of the inhabitants against a danger which might be most urgent. This being so, we must look at the regulation with this conviction in our mind. In the case of the King *v.* Spencer, 3 Burr. 1838, it is said by Wilmot, J., "The true test of all bye-laws is the intention of the crown (in this case it is the intention of the legislature) in granting the charter, and the *apparent good* of the corporation." And clearly it is necessary for the good of the inhabitants of a thickly peopled town, that when a case of hydrophobia makes its appearance, every thing that can be done should be done without a moment's delay to prevent other dogs from being in the way of the one or more dogs that have been ascertained to be mad. Then if so, the legislature, when they authorised regulations to be made for preventing dogs running at large, must be reasonably supposed to have intended that the corporation should have power to prevent it, by such regulations as would best answer so indispensable an object. The case of Kirk *v.* Nowell, 1 T. R. 124, is certainly an explicit authority for holding that a corporation can make no bye-law to incur a forfeiture, unless the power to do so is expressly given to them, and I take that general principle to stand unshaken. But does it apply in this case? In my opinion it does not. There the object was to restrain people from manufacturing certain articles in a bad and slovenly manner: the end in view was to protect the public and maintain the credit of the trade. The bye-laws which were allowed to be made for that purpose were to be enforced, as the charter expressly provided, "*by force or amercement.*" The corporation took upon themselves to add to this penalty (which alone was authorised) another and much more stringent penalty—the forfeiture of the article: they did this by way of providing a further punishment. But in the case before us, that is not the object: this dog was not shot in order to punish its owner, nor would any punishment, however severe, attain the end in view. He was shot, as we may, and ought, I think, to infer, in order to prevent the alleged hydrophobia from spreading. That undoubtedly is, and naturally must be, the intention of such a law, and of such an act done under it. Acting, as we must assume this corporation to have done, for the good of the city, we are to believe that there was that urgent occasion for prompt measures, which the resolution recites; that cases of hydrophobia had appeared which had actually been fatal. In such a case the city authorities are bound to consider that one mad dog, running about the street, may in a few hours or a few minutes bite hundreds; or that he may have already bitten many which may be running about the streets—not yet known, or appearing to be mad, but certain, in that case, speedily to become so. We must see that the lives of all the dogs in the city are not to be put in competition with the contingency of one human being falling a victim to so cruel a calamity; and at the same time, we must see that no one can be safe under such circumstances as are affirmed in the resolutions stated in these pleadings, unless all dogs that have been running at large can be for a time confined, in order that it may be ascertained whether they have escaped being bitten, and in order also that they may not be running in the way of the mad dogs that are known to be about. We have no discretion to say, upon

these pleadings, that the time limited was too short for giving to the owners of all dogs a fair chance of securing them, and thus saving their lives; that must depend upon the urgency of the circumstances, of which the mayor is made the judge. Then the object is, that this running at large of dogs shall absolutely cease, and that the imminent danger shall be at once dispelled. If, notwithstanding the proclamation that may issue, one or two dogs may be allowed to run at large, in disregard of it, then, by the same right, all might be so allowed. But the intention is, that none shall be permitted to be wandering abroad; and unless that can be enforced, there can be no security. Punishing the owners for infringing the laws, would neither give security nor satisfaction to the people, whose lives are in danger—the owners, besides, may be unknown; and when we consider the nature of the proclamation, and the urgency of the occasion on which it issues, it is reasonable to infer that dogs found running at large contrary to the notice, have no owners at hand to concern themselves about them. If the owners are at hand, but will do nothing, then there is the same urgency as regards the public, and less reason for hesitation as regards the owner of the dog. It must be observed, further, that the 22d clause gives a general power to make bye-laws "to provide for the health, and to regulate the police," of the city. It can hardly be denied that hydrophobia is a disease, and one of a very alarming character, justifying the strongest measures that may require to be taken for arresting its progress; and I find it difficult to decide on any clear ground, that the police of a town, which is defined to be its regulation and government, does not legitimately include among its objects one so indispensable as the taking care that dogs shall not run loose about the streets, while cases of hydrophobia are discovering themselves. We must admit that, either the providing for the *health* of the city, or the regulation of its police, must of necessity include this matter; that is, that the power to do these must in reason be taken to include the power of preventing dogs running at large, whenever that may appear to be expedient, for guarding against the danger of hydrophobia. But it may be said that this argument only establishes, what I think is the case, that, under these general powers given in the 22d clause, the mayor and commonalty might have made such regulations, even if there had been nothing said in the statute relating to the particular matter of dogs running at large. But then, the question still occurs, to what extent could they have gone in their measures for this purpose?—could they have passed such a bye-law as is pleaded here? We need not consider this question apart from the other; for they are, in truth, identical. The statute, in all that it does say expressly relating to the subject, says only this—that the mayor and commonalty may make laws "to *prevent* and *regulate* the running at large of dogs, and to impose a reasonable tax upon the owners and possessors thereof." The imposing a tax, I take it, is to be looked upon rather as a measure of revenue than as a mode intended to be pointed out for indirectly restraining or prohibiting the keeping of dogs, by imposing a tax upon them. The full force of the other expression, "to regulate their running at large," is not material to be considered, for it evidently cannot give a greater authority than the word first used—namely, to "*prevent*." It is, on the contrary, a modification of it—a power to prevent, not absolutely and generally, but at certain times, or

under certain circumstances or restrictions. The question, then, after all, is, what laws may the mayor and commonalty pass, "in order to prevent dogs running at large in the city?" for this power "*to prevent*" them is expressly given by the statute. It has been contended, that they can no further prevent it than by passing a law prohibiting the running at large of dogs, and annexing penalties by fine or imprisonment for the breach of that law. But I cannot concur in that view of the question; for the statute expressly gives in the conclusion of the 22d clause a power "to make all such laws as may be necessary and proper for carrying into execution the powers thereby vested in the corporation, for the peace, welfare, safety and good government of the city, as they may deem expedient." Now, among "*the powers vested*" by the statute in the corporation, is this power—"to prevent dogs running at large:" there is, therefore, authority given to the mayor and commonalty to "*make all such laws* as may be necessary" for that specified purpose. Then, why might they not make the law they have made? I can conceive only these objections: first, It may be said it is not *necessary* for the purpose; and that their authority is expressly limited to the making such laws as may be necessary. But there is no saying to what length that argument might be pressed.—If for the infraction of any law they should annex a penalty of 3*l.*, it might be objected that 2*l.* fine would have been clearly sufficient, and that the imposing a larger fine was therefore unnecessary, and so illegal. The discretion to judge of what is necessary for effecting the end in view is in my opinion vested in the legislators who are empowered to make the law, except that it is subject to these restrictions:—1. The bye-law must not be repugnant to this statute, nor repugnant to the general laws of the province; for that is expressly provided. This bye-law is not, as I conceive, objectionable on either of these grounds. It is not repugnant to anything in the statute 4 Will. IV., ch. 23, nor repugnant to the general laws of the province, in any other sense than all alterations made by statutes may be said to be repugnant to the previously existing law. And, secondly, for the protection of the community, and for preserving the corporation within just limits, this court must of necessity have the power of deciding whether the bye-law in question is, or is not, a reasonable one. If the statute 4 Will. IV. had in express terms given power to prevent dogs from running at large, by making a bye-law under which they might be shot, then of course no question, as to whether the bye-law could be made under that express and particular authority, could properly be raised here, for we should have no right to over-rule the legislature. But where the authority is given, as it is here, in general terms, that is the power "*to make laws for preventing,*" &c., then we may be called upon to consider whether the bye-law is a reasonable one, so that it comes fairly (I mean, of course, legally) within that power. We are, I think, now in fact called upon to pronounce an opinion of that kind in respect to this bye-law. Its reasonableness in a legal view is just the question. We see that for the suppression of dangerous fires in the city the same statute gives power to pull down adjacent houses which are not on fire. This shews that the legislature, for the protection of public interests, think it not unreasonable to sacrifice property much more valuable than dogs. But it may be said that this passage in the act affords an argument the other way, because it proves that when the legislature meant

to authorise the absolute destruction of property for a public good, they felt it necessary to confer such a power in express terms. Undoubtedly there is greater propriety in granting such authority specifically, than in leaving it to be inferred from words of general import; but I cannot say that it was necessary. If, for instance, the statute had not in terms given power to authorise, in cases of fire, the pulling down of adjacent houses, such a power, I consider, would nevertheless have been vested in the corporation under the general terms used, for individuals could do it from the necessity of the case when there was no regulation on the subject, and it would be repugnant therefore to say, that the corporation might not make regulations for enforcing the prompt and discreet use of this inherent power. It would have been far better if the statute 4 Will. IV. had left no room for doubt, by expressly giving power to the corporation to pass such a bye-law as they have done. The English statute, 2 W. & M., sess. 2, ch. 8, sec. 20, is an instance where a power of this kind, though not altogether similar, was specially given. But I cannot say that because the bye-law before us goes the length of authorising the dog to be destroyed, it cannot be supported for want of a specific authority in the statute to adopt that particular method of prevention. It has been argued, that because the statute provides that no person shall be subject to be fined more than $5l.$, or to be imprisoned more than thirty days, for the breach of any bye-law, therefore, by implication, no bye-law or regulation can be otherwise enforced than by fining or imprisoning for its breach. But that argument clearly will not hold. It must be admitted to be a principle generally prevailing in these cases, that the only mode of *punishment* for offending against such bye-laws is by fine or imprisonment, and the enactment which I have just cited, limits the fine or imprisonment to be imposed in any bye-law of the city of Toronto within certain bounds. This only shews that if the corporation, in order to compel owners of dogs to keep them up, had imposed a fine, as they might have done, on any owner who after public notice should neglect to confine his dog, they could not have made the fine larger than $5l.$, nor could they imprison him more than thirty days; and upon the general principles of the common law they could not, in my opinion, have adopted any other *punishment*. But the shooting of dogs under this bye-law was not authorised or intended as an act of punishment; it was an act of precaution for preventing an impending evil—or indeed it may be regarded as an act done for removing a present evil, for when hydrophobia is raging among dogs in a populous town, all dogs running at large about the streets are at such a period an actual nuisance, and one of the most grave and alarming character. The object is to abate it without delay. The owner of the dog may not be present, or may be unknown, or the dog may have no owner, in any of which cases the corporation, who are intrusted with the police of the city, could not attain the desired object of restraining the dog by fining or imprisoning any person; and as neither the corporation nor its officers can be called upon to recognise to whom the many dogs in the town may belong, it stands to reason, I think, that for the common safety they must be permitted to look upon all dogs that in a time of general alarm are suffered to be running about the streets in defiance of the proclamation, as dogs having no owner, or at least none within their jurisdiction. It is

the same thing to the public, so far as the fear of hydrophobia is concerned, whether the dog has no owner, or an owner who will take no care of him in obedience to the law. There is reason, in my opinion, in looking upon all dogs, whether they may be counted by scores or hundreds, (and without discrimination as to individuals, which could only be upon some arbitrary and capricious principle) that may be found running at large after the time mentioned in the proclamation has expired, as dogs of whom nothing is known, but that they are dogs wandering about in violation of a law passed upon what we must suppose to have been sufficient proof of a necessity of the most urgent kind; dogs, that for all that is known by those who may be met by them in the street, may be already mad, or may have been bitten and certain to become mad, or at least liable to be bitten by other dogs which are known to be mad, and thereby to spread indefinitely a calamity the most awful perhaps of any that afflicts humanity. It may be objected, that the proper course would have been, not to presume to authorise an immediate and indiscriminate, and in most cases unnecessary destruction of the animals, but rather to have directed that they should be apprehended and secured. We could not however insist upon it as reasonable, that on every such occasion, hundreds perhaps of dogs are to be supported at the public expense, till they are claimed. It might seem reasonable, or at least more considerate, that they should be detained for a day or two, till the owner, seeing them advertised, might have an opportunity, if he were vigilant, of reclaiming them. And I confess I should like better to see a law paying this kind of respect to private rights, and placing the matter upon some such footing; but I do not feel myself at liberty to exact that as a matter of legal necessity, and especially where hydrophobia has broken out (if I may use the expression), and is actually raging. It must be left, rather, to the consideration of the body who are to legislate on the subject, and who we may presume will do so with a desire to consult the feelings and interests of others, so far as may be compatible with the public safety. When hydrophobia is prevailing among dogs in a particular town, it would not be very reasonable to require of any one to subject himself to the risk of an attempt to secure without injury dogs running about the streets, of which he may be doubtful whether they can safely be meddled with or not. If there should really be anything suspicious in the appearance of the dog, it would be folly to attempt it, and it is impossible to maintain for a moment, that at such a period the steps which a city officer might safely take, should be either legal or illegal, and subject him in the event to be treated as a trespasser, or otherwise, according as a court of justice in each individual case might, some months afterwards, estimate the cause of apprehension or degree of danger, and perhaps on very conflicting evidence. It is, on these grounds, my opinion, that so far as depends on the right of the mayor and commonalty under the statute 4 Will. IV. ch. 23, to pass such a law as that set forth in the plea, the defence is sustainable. We are to suppose that facts such as are recited did exist, calling for the exercise of the legislative power to such extent as might be necessary for preventing dogs from running at large. Although the statute says nothing of hydrophobia, or the danger of mad dogs, yet I think we must, in weighing the force that may be properly given to the word *prevent*, take into our consideration the urgent

necessity for immediate and absolute prevention which may arise from that cause, and must suppose that the legislature intended to confer a power of prevention adequate to the emergency, unless the power is bounded by the statute to certain methods of prevention, which I do not find to be the case. Considering, therefore, the peculiar nature of the injury to be guarded against, the consternation it excites, and the misery it may occasion—and considering also the light in which the common law regards a property in dogs—I am of opinion that the corporation have, under the statute, power to make such laws as may in their judgment seem best calculated for at once arresting the evil. And it does not seem to me to be an unreasonable abuse or excess of that power, to proceed upon the supposition, that during the prevalence of hydrophobia, and after a proclamation duly published directing all persons to confine their dogs within a certain time, such dogs as are nevertheless suffered to be wandering about the streets, are dogs straying from their owners, or having no owners, and which it is necessary to destroy, in order to prevent the rapid and fatal spread of the dreadful evil of hydrophobia. If this were prescribed as an act of punishment, then it would seem undoubtedly to be an unauthorised law, on grounds which I have already stated; but we ought to regard it rather as a measure of prevention, and in that light justifiable by the necessity, of which the corporation are the judges, as being intrusted with the preservation of the health and with the police of the city. It was forcibly and naturally enough insisted upon in the argument, that the same clause which gives them authority to make laws for preventing the running at large of dogs, gives authority also and in words of precisely the same import, to make laws for preventing cattle, horses, swine, poultry, &c. from running at large: that it cannot be imagined that the corporation could assume to make a bye-law empowering their officers to shoot any horse or cow found in the street, and that they had never pretended to do so. It seems at first a natural conclusion to come to, that the same form of words used in two or more places in the same clause must be taken to carry the same meaning, but upon reflection it is evident, that we must understand and give effect to them according to the subject matter. The evils to be apprehended from cattle, swine, or poultry running at large, are merely injuries to private property, and to the neatness and good order of the town; and it can neither be necessary, nor reasonable, to allow the destruction of valuable domestic animals in order to prevent the risk of such injuries. Impounding till the damage is paid, is the more natural remedy, which the common law has sanctioned from an early period for the injury to private property, and fine upon the owner seems to answer all the purpose of preventing the public nuisance. Nevertheless, the legislature may by law sanction the more rigorous course of allowing a forfeiture of the animal, as in the case of the English statute which I have cited (*a*). Where they do not expressly sanction it, a bye-law to that effect might be found open to the exception taken in *Kirk v. Nowill*. (*b*) It has never yet, however, been decided with reference to this statute, that such a bye-law would be void, and therefore the argument is founded upon a *petitio principii*. But in this case the object of the bye-law is not to punish or to prevent trespasses

(*a*) 2 W. & M. Sess. 2, ch. 8, sec. 10.

(*b*) 1 T. R. 124.

upon property, but to protect the people of a town against danger to their lives,—against threatened death in perhaps its most distressing form. What I have said, applies to the substance of the defence, and that only so far as it depends on the validity of the law, on which point I am of opinion with the defendant. As to the special exception taken to the form in which the defence is pleaded, I think the bye-law being stated to have been made “under and by *virtue* of the statute,” is as good as stating it to have been made *according to* the statute. The direction of the legislature contained in the 21st clause “that every legislative act of the city shall be expressed to be enacted by the mayor, aldermen and commonalty of the city of Toronto in common council assembled,” ought undoubtedly to be observed; but I think we cannot go the length of holding that the omission would make the bye-law inoperative, and that we are not to presume it was omitted, because the plea does not state it. Another exception raised is, that it is not averred that the defendant shot the dog within the city. But the plea does state expressly that defendant shot the dog under authority of the bye-law at the said time when, &c. while he was running at large within the city contrary to the bye-law and proclamation. The defendant could not at that time have shot the dog within the city, unless the dog was there. The argument however was, that the plea should have stated that the defendant himself was within the city when he fired the gun. This is requiring the statement to be made in different terms from those always used in such defences, or in indictments, or declarations charging offences or trespasses. If the defendant shot the dog within the city, then he was, constructively at least, within the city when he did the act. The blow is considered to be struck by him on the spot where it takes effect by the force which proceeded directly from him. And at any rate the form of such pleadings shews, that in all such cases the intendment is that the party was in the parish or place where the act is stated to have been done by him, unless the contrary appears. In Coombe's case(*a*), the defendant standing upon the land in the county of Southampton, fired upon a person who was in a boat on the sea 100 yards from the shore: he was indicted and tried at the Admiralty session in 1785, for committing the murder upon the high sea, and was convicted. An exception was taken, on the ground that the case was not within the Admiralty jurisdiction. It was argued before all the judges, and they were of opinion that the defendant was properly convicted, for that the offence is committed where the death happens, and not at the place from whence the cause of the death proceeds.

Another objection taken to the plea is, that it does not aver that the bye-law was enrolled. This appears to me to be a good exception. The 48th clause of the statute enacts expressly, that every act passed by the common council shall be enrolled; and it provides that such act shall thenceforth (i. e., after the enrolment) *go into effect* as a law of the city of Toronto. Stating that the law was passed, and signed and sealed, is not sufficient; before it can *go into effect* it must be enrolled; it is therefore not a law before that. Its effect dates from the enrolment, not from the passing, and it cannot avail as a justification of any act done under it till after it *has* been enrolled. The provision is a reasonable one, in order to give to

all the inhabitants an opportunity of seeing the laws of the city, and the most authentic means of knowing by what laws they are to be governed. Upon this ground, therefore, the plaintiff is, in my opinion, entitled to judgment on the demurrer, and also on the last exception taken, namely, that the plea has no proper formal conclusion; it ought to have concluded with a verification.

JONES, J.—In all towns provision seems to be made for securing the inhabitants, at certain seasons, from the consequences of that dreadful calamity hydrophobia, produced by the bite of a mad dog. Of domesticated animals, dogs are particularly liable to this disease, in warm climates, in the hot season of the year, and frequent cases occur in this country. Most certainly a power should rest somewhere to use the necessary means to prevent or limit the spread of the calamity, which can only effectually be done by lessening the number of dogs, which is sometimes allowed to increase to such an extent as to become a nuisance, without regard to the dangerous complaint to which they are subject. If the legislature intended to vest that power in the corporation of Toronto, it is to be regretted that they did not do so in explicit terms. It is quite certain, that although the power to regulate and prevent the running at large of other animals could never justify a bye-law authorising the destruction, it may be held, as was well argued at the bar, that the peculiar nature of the dog would justify the destruction, to prevent the evil intended to be provided against, because no effectual means can be devised of restraining them when the owners neglect to secure them, or when dogs are prowling about, as in many cities is known to be the case, with owners unknown, and without owners. It is perhaps fair to presume, that when the municipal body of the town shall have resolved "That whereas it appears certain that one or more cases," &c., that dogs under such circumstances running at large are not owned by any person, and therefore could in no way be prevented from so running at large except by their destruction. And such destruction, from the nature of the case, may have been contemplated by the legislature. In London, I understand that dogs found at large are secured, by municipal regulation, and, if not claimed after due notice, destroyed, upon the presumption that they have no owners. In Quebec and Montreal, and the cities of the neighbouring country, I believe, the municipal bodies for the government of the towns, authorise the destruction of dogs in circumstances like these under consideration. I am therefore inclined to hold, that the legislature of this province, by the provision authorising the corporation "to prevent and regulate the running at large of dogs," gave it authority, under circumstances like those mentioned in the resolution of the 4th February, 1844, to cause the destruction of dogs, if in their judgment and discretion they could not otherwise effectually be prevented from running at large.

MCLEAN, J., and HAGEMAN, J., concurred.

IN RE COMPLAINT OF BARTLETT v. MEYERS, AN ATTORNEY.

Where an attorney purchases securities from his own client, using no undue advantage in the transaction, the court, though they may disapprove of the act, cannot punish him as for any violation of his duty.

ROBINSON, C. J.—An application made to us by *Mr. Sullivan*, on behalf of one Bartlett, against an attorney of this court, having been answered

by affidavits in the first instance, and the case being fully before us, we find it impossible to make the matters stated on behalf of Bartlett the ground of any proceeding against the attorney. It is indeed much to be desired, that attorneys would refrain from mixing themselves up in the transactions of their clients, or of any with whom they come in contact professionally; and it would no doubt be safer as regards their own reputation, and more for the honour of the profession, if they would be scrupulously careful to avoid even the appearance of it. But it is not in our discretion to enforce that line of conduct to such an extent as would come up to our ideas of the proper standard of the profession ; much must, in all relations of life, public as well as private, be left to the conscience of individuals, and to their own sense of what is becoming. In the case before us, we see no charge made out of any breach of confidence as between this attorney and his client, who, indeed, urges no complaint against him. Mr. Meyers swears that Mr. Bartlett proposed to him to make the purchase, long before he made it, and the statements of both parties give reason to conclude that Mr. Bartlett's own attorney had thoughts of acquiring these securities, upon terms even less favourable for the creditors of Bartlett than Mr. Meyers obtained them upon ; and that if he had done so, his purchase of them would have been fully assented to by Mr. Bartlett. It is not easy to say on what fair ground Bartlett could complain of the same thing as an injury when done by Mr. Meyers, who was not his attorney, and was not in any way employed by him, or concerned for him in the matter. The letters of Mr. Burns annexed to the affidavits fully bear out Mr. Meyers in the desire shewn by him to obtain for his clients the 500*l.* without deduction for *costs*, and with interest during the year's delay of payment. The expectation was reasonable. It is denied by Mr. Meyers, that Bartlett even offered to pay the costs. I see no statement unrepelled which would warrant us in imputing to Mr. Meyers any unfair contrivance. There is no injustice in Mr. Bartlett's being made to pay his debts so far as he is able. And as to the bare fact of an attorney purchasing from his own clients, securities held by them against third parties, using no undue means to procure advantage to himself in the transaction, we should look in vain for any instance of such a fact being held to be a violation of his duty, subjecting him to punishment by the court. We can say no more than that it would be better if nothing of the kind were done.

Rule refused.

TRIPP v. FRASER.

A military officer, on duty out of Canada, and suing as plaintiff, must, upon the usual affidavit, give security for costs.

This is an application for security for costs, referred from the Practice Court. On the defendant's side the ordinary affidavit had been made. In opposition, an affidavit was filed, stating that the plaintiff was a lieutenant-colonel in her Majesty's forces, attached to the 98th Regiment of Foot, and as such on actual duty, as the deponent had reason to believe. This affidavit was made by the plaintiff's attorney. It was argued as a further ground against the rule, that since the late act abolishing imprisonment for debt, security for costs could not be exacted, because the practice was founded on the inability to attach the plaintiff's person, by reason of his residence out of the jurisdiction, and that

reason failed when the party could not by law be arrested if he were resident within the jurisdiction.

ROBINSON, C. J.—Upon the first ground we are of opinion, that a military officer being on service out of Canada is no reason why there should not be security given for costs, for this is not his home at any rate, and he cannot be said to be absent *from hence* because he is on military duty. It is no hardship on him to be obliged to give security for costs here, for he cannot allege, for all that appears, that he has been sent out of this jurisdiction on public service. As to the other ground, it is many years since a party in this province could be held to bail for costs merely; and yet, notwithstanding, suitors within the jurisdiction, and liable to costs, could not have been arrested, security from plaintiffs residing abroad has been not the less exacted. The practice so long prevailing is the law of this court, and it is founded on good reason. Persons living within the jurisdiction have commonly property which may be taken to satisfy their liabilities; those resident abroad, it may be presumed, have not. In England, the servant of a foreign ambassador, when plaintiff, may be compelled to give security for costs, though resident within the jurisdiction, because he is exempt from arrest by reason of his privilege. It seems not consistent with this to hold, that an ordinary person, who could not be arrested if present, should for that reason not be bound to give security for costs when he is resident abroad. We are of opinion, that security for costs should be ordered.

Rule granted.

PAGE v. PHELAN.

A judgment in an inferior court, for a specific sum, is *prima facie* evidence in a superior court against a less sum only being due; and as respects the merits of the judgment it is conclusive evidence, till it is repelled by proof of such facts as have been admitted to destroy the effect of a foreign judgment as evidence of a debt.

Plaintiff sues in trover; defendant pleads general issue, and secondly denies that plaintiff was possessed of the goods as of his own property; thirdly, that plaintiff left the goods with him in pledge for a debt, viz. 20*l.*, which is yet unpaid; fourthly, claims a lien as an inn-keeper for his bill for lodging, &c. To the 3rd and 4th pleas, plaintiff replies, that he owed the defendant 2*l. 1s. 3d.* on those accounts mentioned therein, which he satisfied, and that defendant still detained the goods. Defendant rejoins to each of these replications, that a larger sum of 20*l.* was due, and denies that he accepted 2*l. 1s. 3d.* in satisfaction of his lien, as the plaintiff alleges. The question at the trial was, whether a larger debt was due than was stated in the replication to the 3rd plea, namely 2*l. 1s. 3d.* Plaintiff and his partner, and several of their workmen, engaged in a job of road-making, were boarded by defendant, and it was proved that plaintiff placed in his charge the goods in question as security for payment. The plea, indeed, admits such a transaction, the issue raised being only upon the amount of the debt. On the trial it was proved, that after the transactions were closed, defendant sued plaintiff in the division court, and recovered 10*l.* as being due to him then on this account. The jury found for the plaintiff 35*l.*, though the learned judge told the jury that he thought the evidence preponderated in defendant's favour, leaving it to them, however, to find for plaintiff, if

they were satisfied that more was due to the defendant, on the account for which the goods were left in pledge, than 2*l.* 1*s.* 3*d.* Defendant moves for a new trial, on the ground that the verdict is contrary to law, and for misdirection: he contends that the judgment in the division court was conclusive evidence that 10*l.* was due in January, 1844; and that as the wrong complained of was detaining the goods in October, 1843, when it was proved the defendant refused to deliver them, it ought to have been found by the jury that 10*l.* at least was due at that time.

H. J. Boulton, counsel for plaintiff.

Sherwood, Q. C., counsel for defendant.

ROBINSON, C. J.—In one sense the judgment was not conclusive, for it might have been shewn (if the truth were so), that the debt recovered in January was for a wholly distinct cause of action from that for which these goods were pledged; but that was not pretended, and it is plain upon the evidence that it was not so. The judgment was, in my opinion, *prima facie* evidence, that the amount due on a transaction which these goods were pledged to secure, was more than 2*l.* 1*s.* 3*d.* It was also conclusive evidence, till repelled by proof of such facts as have been admitted to destroy the effect of a foreign judgment as evidence of debt. Such judgments stand on the same footing as the judgments of inferior courts: they are deemed conclusive upon the merits, into which we are not to examine, by putting ourselves as it were into the place of that tribunal which the law has made competent to decide the point. The verdict was contrary to the evidence, I think, and there must therefore be a new trial; and I think as the judgment was not impeached, so it should be without costs.

New trial granted.

GRAND RIVER NAVIGATION COMPANY v. McDougall ET AL.

The court discharged a rule for setting aside an award—first, because it was not stated that the rule was drawn up on “reading the award;” and, secondly, because the alleged defects in the award were not sufficiently pointed out.

The rule ran thus: “Upon reading the affidavits and papers filed, it is ordered, that the Grand River Navigation Company, upon notice of this rule, do shew cause why the award made in this matter, by appraisers appointed by the act of parliament of Upper Canada, should not be set aside, upon *grounds disclosed in the affidavits* filed, and apparent in the award itself.” (a)—It was objected, first, that the defects should have been pointed out in the rule. Secondly, that the rule is not drawn up “on reading the award.” The rule was further opposed on the merits.

ROBINSON, C. J.—As to the legal exceptions against this motion. We think they are well founded—the motion against the award was made too late. The rule does not purport to have been drawn up on reading the award or a copy of it; and the objections to the award are not sufficiently stated in it. These are preliminary objections, which, in our opinions, all apply in the case of awards made under our statute 2 Will. IV., ch. 13, in the same manner as with regard to other awards, and independently

(a) See 2 M. & W. 391.

of the difficulties which they create to our interfering, we are of opinion that, upon the case laid before us, looking at the affidavits on both sides, we should not have been warranted in setting aside the award.

Rule discharged.

IN RE COMPLAINT OF JOHN PATTERSON v. WM. MILLER, AN ATTORNEY.

Court will not proceed summarily against an attorney upon a complaint of matters for which (if the charge were true) he might be indicted; especially where the affidavits in support of the charge are contradicted by affidavit.

Mr. Notman moves for a rule on Wm. Miller, Esq., an attorney, to pay over to Patterson, Gamble and Jones, their costs of defence in the action of O'Reilley against them, as between attorney and client, and to answer the affidavits filed, and to pay the costs of this application.

ROBINSON, C. J.—The affidavits filed in answer so far meet the alleged grounds of complaint as to preclude our granting the rule. If it be true that Mr. Miller has stirred up law suits in the manner imputed to him, it is a serious offence, punishable by indictment; and when he denies it, and disproves the charge by the affidavits of others, he has a right to be tried by a jury, and cannot be summarily dealt with by us, upon such conflicting statements. When an attorney omits the common caution of taking a written retainer to commence a suit, he has little claim to be protected against the costs of such an application; but we cannot refuse them to the attorney in this case, for he has been called upon to answer a similar charge included in this same motion, in the instance of Armstrong, from whom he did in fact take a warrant.

Rule discharged, with costs.

DOE DEM. CROOKS v. CUMMINGS.

Amendment of jurata ordered in banc, where a new trial had been ordered and the plaintiff had neglected to alter the jurata, in consequence of which the judge at nisi prius had declined to try the cause.

Mr. Crooks moves for a *venire de novo* in this cause. After the jury had been sworn, it was discovered that in the jurata the day of nisi prius was wrong, not having been altered from the preceding assizes, after a new trial had been granted. The plaintiff moved to amend, but the learned judge held, that he could not amend in that particular at the trial. It was objected on the other side against this application for a *venire de novo*, that this is not the proper course; that the *venire* being for a wrong day, was as no *venire*, and so there is no ground for a *venire de novo*; that the record should now be amended. The plaintiff replied, that the jury having been sworn and afterwards discharged, they have nothing further to do with the cause, and that a *venire de novo* is the proper remedy for the error. 2 Wils. 144, 1 Salk. 48, and 1 Moore & P. 581, were referred to.

J. H. Cameron, counsel for defendant.

ROBINSON, C. J.—We think the plaintiff should have leave to amend his jurata, and go to trial. In the cases cited, a verdict was rendered, the jurata being for a wrong day; here there has been no verdict.

DOUGALL v. MOODIE.

A party may have a commission to examine a witness before issue joined, upon his undertaking not to act under it until the cause is at issue.

It seems the rule had been made absolute and had issued. A commissioner to examine witnesses in this cause was moved for before a judge in July last, and an order obtained; upon affidavit that Parker, whom it was desired to examine as a witness, was about to depart for England, (in a week), not intending to return. When this order was obtained, defendant had been served with process and had appeared, but no declaration had been served or filed.

J. Duggan, counsel for plaintiff.

Crawford, counsel for defendant.

ROBINSON, C. J.—I think, upon the authority of the case in 9 Dowl. 812, that the plaintiff may have a commission under the circumstances sworn to, on his undertaking not to act under it until the cause is at issue. The Court of Exchequer have recently felt themselves at liberty to introduce this innovation upon former practice, for the convenience of parties; and I see nothing in our statute to prevent our following the example.

RHODES v. EXECUTORS OF CRAWFORD.

A promissory note given to an agent upon a settlement of accounts, may be used as evidence of an account stated with the person for whom he was acting, when the fact of agency was known to the other party.

Plaintiff sues in assumpsit. The declaration contains, among other counts, one on an account stated between the plaintiff and the defendants as executors, to which the defendants plead the general issue. The plaintiff had a verdict for 297*l.* 13*s.* 3*d.*, subject to leave reserved to defendants to move to reduce the verdict on a point raised at the trial. It was proved that one Murphy was agent for the defendants as executors, and as such had a settlement of accounts with James Rhodes, brother and agent of plaintiff, Joseph Rhodes, and gave him a due bill on behalf of the executors for the amount of certain goods which James Rhodes had sold him. This due bill, or note, is made payable to James Rhodes, but it was proved that the goods for which it was given were the goods of Joseph Rhodes, a merchant, for whom James was selling as agent on commission; and that the fact that James was dealing as agent for Joseph Rhodes in the transaction was well known to the testator. The question was, whether the due bill, given under those circumstances, is good evidence under the account stated. If it is, then the verdict was right; if not, then the verdict was to be reduced to 26*l.* 11*s.* 8*d.*

Gamble, counsel for plaintiff.

Crooks, counsel for defendants.

ROBINSON, C. J.—We are of opinion that the plaintiff is entitled to retain his verdict as it was rendered. There was evidence to prove to the jury that James Rhodes had in fact dealt with the testator, not on his own account, but as an agent selling goods for this plaintiff, his brother, and that the testator knew that. The due bill given, upon the settlement between James Rhodes and the executors, through their agent

Murphy, though not available to Joseph Rhodes, the real creditor, as a promissory note, because not made negotiable, might yet be produced on the trial as evidence of an account stated, as it clearly was; and where the real creditor is disclosed, it is evidence of the demand for him, especially when the debtor, Crawford, is sworn to have known at the time that James Rhodes was but an agent for this plaintiff.

ROGERS *v.* SPALDING.

An action for a libel contained in communications made to the executive government, with a view to obtaining redress, cannot be sustained, unless it can be proved that the party making them acted maliciously and without probable cause.

New trial moved, on the evidence; or in the alternative, that judgment be arrested. This is an action for libel said to be contained in a memorial addressed and sent by the defendant to the Governor General. The defendant pleads the general issue, which puts in issue the fact of malice.

Sullivan, counsel for plaintiff.

Wilson, counsel for defendant.

ROBINSON, C. J.—The jury found for the plaintiff 5*l.* damages. After considering the evidence in this case, and comparing it with the statements in the memorial complained of as a false and malicious libel, we fully agree with the opinion expressed by the learned judge at the trial, that there was not that clear evidence of a malicious intention, which enabled him to say that the plaintiff was entitled to a verdict; and we think also, that the learned judge might have gone further, and might have given such a charge to the jury, consistently with the evidence, as would have amounted to a direction to find for the defendant. The law on this point was lately under consideration in this court, in the case of *Corbett v. Jackson*, and is well stated in the case of *Fairman v. Ives* (*a*), where the opinions expressed by Mr. Justice Best, apply strongly to this case. If we could see any reasonable ground for saying that the representation to the government was made in this case maliciously and without probable cause, then undoubtedly the pretence under which it was made, instead of furnishing a defence, would have aggravated the case of the defendant. But what are the facts? The defendant had been long in peaceable possession of a piece of ground, having enclosed it and occupied it with his dwelling house. The plaintiff, claiming that although there never had been a road in use over this inclosed land, yet that by law there might be and ought to be, applies to the district council for their direction to have it thrown open, and the defendant's fences removed. From a regard, as it seems, to the defendant's long possession, and thinking the travelled road sufficient, though it deviated from the straight line, the council rejected the application. The plaintiff, however, relying upon the law being in his favour, as we think it was, proceeded, and without the authority of the district council, and collecting an unusual number of persons, went and pulled down the inclosures and threw the land open. Now it does not signify that he may turn out to have in law a right to do this. So long as we have ground to think that the defendant may have

(*a*) 5 B. & Al. 642.

believed that an outrage had been committed upon his right of possession, and that he honestly applied to the government for redress, conceiving the act to have been illegally done, the defendant was not wantonly aspersing the plaintiff's character. He had a supposed right to property which he had long openly enjoyed. The defendant, with force and a crowd of people, and in a manner unusual at least, pulled down his fences, and threw his enclosure open. I can readily believe that the defendant really looked upon this as a high-handed, unauthorised act. He was at all events stating no imaginary case, but calling for the assistance of counsel, he had a statement of the transaction certainly agreeing in the main features with the facts proved to have occurred, drawn up in the shape of a memorial to the government. It is not intemperate in its language—there was a foundation for the charge. We do not see malice apparent on the face of it, and no malice was otherwise proved. The appeal to the government was natural and proper, if the defendant thought (though erroneously) that the plaintiff and his party were unwarranted in the steps they had taken, and not merely because the plaintiff was a magistrate and a militia officer, which made them amenable in some measure to the executive government for their conduct, but because, if the assemblage was unlawful, and the parties were guilty of a riot, it would naturally fall within the duty of the head of the government to direct inquiry with the view to a public prosecution. We are not to examine statements made on such occasions in a spirit of criticism, to see whether some circumstance has not been inaccurately stated, or some epithet used stronger than the occasion called for. Where there either has been, or has been supposed to be a fair occasion for applying for redress to public authority, it is most important that parties believing themselves injured should not be deterred from seeking redress from the fear of being deemed libellous, though they may be conscious that they are actuated by no malicious feeling, and though none such can be proved against them. It is a very sacred and necessary right that is called in question in this action. It has been often determined, that the privilege which the law extends to such communications, is of that nature that malice must be proved, and can not be inferred merely from the fact of some of the points of the statement being disproved. Where men's rights are attacked, and especially by an apparently tumultuous movement, they may easily fall into errors of fact in some particulars, and great indulgence is to be shewn, where there is at bottom a fair occasion for the appeal made by them. In our opinion, the ends of justice in this case require that there should be a new trial, without costs; for it would be highly detrimental to society that any undue encouragement should be afforded to actions brought under such circumstances.

Rule absolute.

MATTHEWSON v. PETER CARMAN.

Where a bill is drawn and indorsed in Upper Canada, but made payable in Lower Canada, the law of Lower Canada is to govern the time within which notices of non-payment may be sent.

Assumpsit against defendant as indorser of a promissory note given by Daniel Carman. Defendant pleads that the note was given to plaintiff

on a consideration, which has failed; and, secondly, denies due notice of non-payment.

Draper, counsel for plaintiff.

Blake, counsel for defendant.

ROBINSON, C. J.—So far as regards the first defence, the facts relied on were the same as were set up by Daniel Carman, on the action against him as maker; and I held on the trial, as in that case, that it could not avail the defendant, because the facts shewed at all events only a partial, not a total failure of consideration, as pleaded; and the agreement averred, as that on which the note was given, was not the same in substance as that proved. We are all of that opinion, and therefore consider the verdict in this case to be right, so far as that question is concerned. But a point was reserved at the trial of this cause, in regard to the notice to defendant as indorser. The note was made and indorsed at Matilda, in this province; but was made payable in Montreal, in Lower Canada. It was admitted between the parties, that the notice was given too late, if the law of Upper Canada is to govern in regard to that point—but in due time, if the law of Lower Canada is to govern. This is a nice point—upon which, however, our opinion has been expressed in a case decided this term (*the Bank of British North America v. Ross.*) The very intimate connexion between the eastern and western parts of Canada, in commercial dealings, renders it a matter, as I conceive, of pressing importance, that but one law should prevail throughout the province in regard to protests and notices upon bills and notes; and I trust some one will take advantage of his situation in the legislature, to call attention to the necessity of an enactment for this purpose. The greatest inconvenience will be felt, and often, I am persuaded, heavy losses be sustained by the holders of paper in Lower Canada, if the notary in Lower Canada, acting, as I fear he will generally do, in accordance with the law there, shall make a presentment, or send a notice, which, though good by that law, will be unavailing here, where the rigid English rule as to time is at present binding upon our courts. In the meantime, whatever doubts may be started here, or may have been started in other countries, as to the soundness of the recent decision in England in the case of *Rothschild v. Curry* (a), on which we have acted in the late case alluded to, we shall gladly adhere to it so long as it is not overruled in England. It is a decision of the Queen's Bench, not hastily come to, but given after deliberation, and on a review of authorities. It is precisely on the point before us, and reason and convenience in my opinion are with it—though the maxims of foreign jurists, on which it is mainly rested, may be thought rather to militate against it. Besides, we consider that the late act passed by the united legislature of this province (7 Vic. ch. 4), furnishes a strong reason, in addition, for taking the law of Lower Canada as the guide upon notes made payable there; for that statute, for the first time, admits of notice of non-payment being sent by the notary, who, before, was considered here, as in England, to be authorised only to present the note, and protest it. The legislature, I am persuaded, can never have intended that, in the discharge of his notarial duties, he was to go half way by the law of his own courts, and half way by ours.

Rule discharged.

MALLOCH, SHERIFF OF DALHOUSIE, v. PATTERSON.

Where a party, whose goods are seized under a fieri facias, gives bond to deliver them up to the sheriff on request, held, that the effect of that condition is merely that they shall be forthcoming when demanded, and that the sheriff cannot insist on the parties removing them to any particular place within the district: and where, in such a case, the obligor had once delivered up the goods to the sheriff, the condition is performed; and, if they are left in his hands, his refusing to give them up on a subsequent occasion, cannot be set up as a breach of the condition.

Plaintiff sues on a bond given 2nd November, 1842, in two counts—not setting out the condition. Defendant sets out the condition of the first bond on oyer, which is as follows: "Whereas the said sheriff hath on the day above mentioned, by virtue of two writs of fieri facias issued out of her Majesty's district court at Bytown, and to him directed, at the suit of Alexander McDonald and John McIntyre, against the goods and chattels of the said William Grier, levied upon, as the property of the said William Grier, three stoves and pipes, twenty-one chairs, &c.—Now the condition of this obligation is, that if the above Wm. Grier shall deliver or cause to be delivered to the said sheriff, or any person authorised by him for that purpose, at Bytown, the said property as above, whenever it shall be demanded, then this obligation to be void," &c. Among other pleas, to which the plaintiff replies, the defendant pleads, as his *ninth plea*, that the plaintiff, as sheriff, after the making of the bond, viz., 6th January, 1843, attended at the place of residence of Wm. Grier at Bytown aforesaid, in order to offer the property in the condition mentioned for sale under the act, in pursuance of notice given by him, as sheriff, to that effect; that the said Wm. Grier was then and there ready and willing and offered to deliver and cause to be delivered the said property to him, as sheriff, and to any person authorised by him for that purpose, whereof the said plaintiff had notice; but that plaintiff refused to receive the same, and required Grier to deliver the same upon the Market Hill at Bytown aforesaid, and refused to receive the same at the place of residence of the said Grier, at Bytown aforesaid, or at any other place than the Market Hill aforesaid; for which reason, and no other, the said Wm. Grier hath not delivered the said property to the plaintiff, &c. Plaintiff demurs to this plea, assigning for cause, that it does not state a demand by plaintiff, and that defendant offered to deliver the property, except argumentatively, by averring that plaintiff refused to receive the property at the residence of Grier at Bytown. Defendant pleads further, as his *tenth plea*—a plea precisely like the ninth, varying only in stating the day on which the plaintiff attended at Grier's residence to sell the goods, &c., to be the 24th December, 1842, instead of 6th January, 1843—and plaintiff demurs specially to this plea, assigning the same cause. Defendant pleads, as his second plea, that Grier did on 6th January, 1843, at Bytown, deliver the said property to Patrick McElroy, deputy sheriff, &c., and the person authorised by the sheriff for that purpose, according to the condition of the bond, &c. Plaintiff replies to this that, after the delivery of the property by Grier to McElroy, and before the return day of the writ of *fi. fa.*, McElroy re-delivered the said property to Grier, who then took and *received the same to hold according to the condition* of the said bond, &c.; that plaintiff afterwards, viz., on 4th December, 1842, requested Grier to deliver the said property to him on the *Market Hill* at Bytown,

but that Grier refused so to deliver the same, contrary to the condition of the bond, &c. Defendant demurs to this replication, assigning for cause, that it is not shewn that defendant (Patterson) was in any way privy to the re-delivery and agreement of Wm. Grier stated in the replication; nor that the agreement to hold the property, after such delivery, upon the condition of the bond, was in writing—or that the bond was re-executed—or that there was any consideration for such agreement—and that the plaintiff shews no breach of the condition of the bond, but admits a performance thereof. Third plea states a delivery of the goods, by Grier, to the sheriff himself, at Bytown, on 6th January, 1843. And plaintiff replies—admitting such delivery to him by Grier, and setting up the re-delivery by him to Grier, to hold according to the condition of the bond, and refusal to give them up on his subsequent demand. Defendant demurs to this replication, assigning the same grounds as in regard to the next preceding replication. Fourth plea states a demand of the goods by sheriff on 6th January, 1843—that Grier delivered them to the sheriff, who accepted the same in discharge of the bond and condition, and proceeded to sell the same. Plaintiff replies, that after such delivery he re-delivered the goods to Grier, and his subsequent demand of them, and Grier's refusal, &c., as in his preceding replication. Defendant demurs on the same grounds as before. Fifth plea is like the fourth, only varying in stating the 24th December, 1842, as the day on which plaintiff demanded and received the goods. Plaintiff replies, that he did not receive the goods, &c., in discharge of the bond, &c.; but, on the contrary thereof, that he re-delivered the goods to Grier, who received them to hold according to the bond, &c.; and then states subsequent demand of the goods and Grier's refusal. Defendant demurs for the same cause as to other replications, and takes exceptions, further, to this replication, as multifarious and argumentative. Sixth plea states, that the plaintiff on 6th January, 1843, attended at Grier's residence in Bytown, in order to offer the goods for sale under the writ pursuant to his notice; that Grier was then and there ready and willing, and offered to deliver the goods, but that plaintiff required him *not ever* to deliver the same, and forbade him and discharged him from carrying the conditions of the bond into effect, for which reason only Grier hath not delivered the goods. Plaintiff replies (absurdly) to this plea, that he *did not accept* the goods in discharge of the condition of the bond (which the plea does not assert), and continues as in his replication to the 5th plea, though the defences are wholly unlike. Defendant demurs on precisely the same grounds as in his demurrer to the replication to the 5th plea, which is equally absurd, for the pleas being different, the replication to the 6th plea was clearly bad as an answer to that plea on grounds distinct from those taken in the other demurrer. Seventh plea is exactly like the 6th, except that it states the sheriff to have attended on 24th December, 1842, for the purposes mentioned in it, instead of 6th January, 1843. Plaintiff replies, that before Grier offered to deliver the goods as stated in his plea, viz.—on the 24th December, 1842, the plaintiff at Bytown requested Grier to deliver to him the said goods, &c., at Bytown, but that Grier then and there, and before the said offer of the said Grier, wholly refused so to do. Defendant demurs to this replication, as being no answer to the plea. Upon the

second count there is a precisely similar series of pleading, the same bond and condition being set out by defendant on oyer, and the same ten pleas by defendant; to the 19th and 20th pleas, being the two last of these ten, plaintiff demurs as to the 9th and 10th pleas to the other count, and defendant demurs to the replications to the others, which are like those to corresponding pleas to the 1st count.

H. J. Boulton, counsel for plaintiff.

Hervey, counsel for defendant.

ROBINSON, C. J.—The 9th plea does state that Grier offered to deliver up the goods to the sheriff at Bytown, at the house in which they had been seized and were left when bond given; it presents the question whether when the sheriff went there to sell the goods, having given notice of sale, Grier, by offering to give up the goods to him then and there (in Bytown), complied with his bond. Plaintiff demanded them (the plea says) then, but not to be delivered *there* where they *were*, but at Market Hill: was not that a demand of the goods such as opened to Grier the right to tender them on the spot, if that would acquit him, and if the condition that he should take them to Market Hill was unauthorised? It appears by the plea that the property was *demanded*, and that Grier offered to deliver it, but plaintiff would not allow him unless he delivered it at the Market Hill. I think that this was demanding the possession, and annexing to the demand something not required by the condition, for I take the effect of the bond to be merely that the debtor shall have his goods forthcoming where the sheriff had seized them; that he may if he chooses take them there, as he might have done at the time of the seizure, if no delay had taken place. I think the plea shews a demand—a readiness and offer to comply, admitted by the demurrer, and so no breach. It all turns on Grier's obligation to take the goods to Market Hill: if he was not bound, as I think he was not, then plaintiff might as well have demanded the same goods, and some others not mentioned in the bond, and because the right goods only were offered, might bring his action, and hold the bond broken. Defendant is entitled to judgment, I think, on 9th, 10th, 19th, and 20th pleas. *As to the replications*:—Replication to 2nd plea, demurred to:—Defendant is entitled to judgment: he shews a performance of the condition, which plaintiff does not deny, while plaintiff, on his part, assigns as a breach what could be no breach of the bond. If there could be any doubt as respects the obligation of Grier himself, there can be none that this defendant, the surety, cannot be bound for a *second* delivery of the goods by any assent of Grier to *set up the bond again* (a); and as to the breach, it assumes a right to insist on Grier taking the goods to a particular place, which was the sheriff's duty, not the debtor's. Replication to 3rd plea:—Defendant is entitled to judgment on the demurrer to this replication on the same grounds, the only difference being that the plea affirms delivery to the sheriff himself, and the second plea to his deputy. Replication to 4th plea, demurred to:—Defendant must have judgment: he pleads in this plea, not only that Grier delivered up the goods to plaintiff, but that plaintiff accepted them in discharge of the bond. Plaintiff does not traverse this, but relies on a second alleged breach after the bond had been once fully performed.

Replication to 5th plea, demurred to:—In this replication plaintiff does deny that he accepted the goods in discharge of the bond and condition; but his replication is bad, because it admits the delivery by defendant, which was a performance, and relies on a subsequent *re-delivery* of the goods, which could not continue this defendant's liability under the bond; and he assigns as a breach what could be no breach of the bond after the goods being once delivered; and moreover it could never be a breach, because defendant was not bound for the delivery of the goods at Market Hill. Replication to 6th plea, demurred to:—Defendant is entitled to judgment, because this replication is inapplicable to the plea, denying what is not asserted in it; and it assigns no good breach. Replication to 7th plea, demurred to:—The plaintiff seems entitled to judgment on this demurrer: the effect of his replication is, that defendant did not offer the goods as he pleads, but that having before broken his bond by refusing when he demanded them, such offer is no performance, and plaintiff does not assign a good breach.

JONES, J.—It appears to me that the special cause of demurrer fails, because it is expressly alleged in the pleas that the sheriff required the property to be delivered on the Market Hill at Bytown, and refused to receive it at any other place in Bytown. Then the question is, could the sheriff require the property to be delivered to him at any particular place at Bytown? I think he could. The defendant agrees that it shall be delivered at Bytown upon request; therefore, if the plaintiff requests it to be delivered at any place or at any time in Bytown, the defendant was bound so to deliver it. In Bac. Ab., Covenant F., it is stated—"All contracts are to be taken according to the intent of the parties, expressed by their own words; and if there be any doubt in the sense of the words, such construction shall be made as is most strong against the covenanter, lest, by the obscure reading of his contract, he should find means to evade and elude it." As, therefore, no specific place is named for the delivery of the property in Bytown, the covenanter, it appears to me, is bound to deliver it at such place as shall be required by the covenantee in Bytown. Judgment for the plaintiff on the demurrs to the pleas. Second plea—that Wm. Grier did on 6th January, 1843, deliver the property to the deputy sheriff. Replication to second plea—that after the delivery of the property to the deputy sheriff, and before the return of the writs, the deputy sheriff re-delivered the same to Wm. Grier, who received the same, to hold according to the condition of the bond, and that subsequently it was demanded of Grier and refused. Demurrer to replication to second plea. This demurrer is good, because defendant could not be prejudiced by a re-delivery to Grier, after the condition of the bond had been performed. Replication to third plea bad, for the same reasons. Replication to fourth plea demurred to, is bad for the same reason. Replication to fifth plea bad—it does not allege the delivery to the sheriff upon his request, but traverses that, after the delivery thereof to him, he re-delivered the same to Grier, who accepted the same to hold according to the bond. Sixth plea—replication to 6th plea bad, for the same reason. Seventh plea—the replication to the 7th plea is good, because it shews a breach of the bond before the delivery to the sheriff as stated in the plea. The demurrs to the replications to the 12th, 13th, 14th, 15th and 16th pleas are bad, for the reasons assigned with regard to the seventh.

DOE DEM. GRAHAM v. EDMONDSON.

A tenant endeavouring to defend his possession by a title adverse to the lessor of the plaintiff, is not entitled to notice to quit; a new trial will only be granted to advance the substantial ends of justice, where the grounds are discretionary with the court.

Ejectment for south half of 19 in 3rd concession of Whitchurch. The lessor of plaintiff made title under the will of his father, the late Colonel William Graham, made in 1813, whereby he devised this land to his son William Graham, to hold to him and to the heirs of his body lawfully begotten, and in default of such issue, to testator's right heirs. William died without issue, having, on the 3rd of November, 1823, made a lease of these premises to the defendant (100 acres of land), at a rent of two shillings and sixpence per annum, during the lives of Edmondson and of two other persons named, aged five years and two years, or of the longest liver of them. Adam Graham, the lessor of the plaintiff, is his heir at law. The defendant, at the trial, attempted to support his title to possession by giving in evidence a receipt dated in 1827, signed by the lessor of the plaintiff, acknowledging payment of the rent up to that date, by John Edmondson and Robert Edmondson, for Lot No. 18, north half, and 17, south half, and he relied upon this as evidence of confirmation by Adam Graham of the lease made by William. The learned judge directed a verdict for the plaintiff, subject to the opinion of the court, whether this acceptance of rent by Adam Graham could have the effect of confirming the lease, or would at least entitle the defendant to notice to quit, before he could be treated as a trespasser.

Blake, counsel for plaintiff.

Bell, counsel for defendant.

ROBINSON, C. J.—It was not perceived at the trial, that the receipt has in fact no relation to these premises, which consist of the south half of Lot No. 19 in the 3rd concession, and this makes an end of all idea of confirmation by the receipt of rent, for no other evidence was given; and as Lots 17 and 18 in the second concession were by the will devised to Adam Graham, for all that appeared in evidence the receipt might well have been given in relation to those lots. At any rate, as no notice was taken at the trial of the receipt being for rent on different lots, no attempt was made to explain it. The defendant has moved for a non-suit on the leave reserved, or for a new trial, on an affidavit tending to explain that there was an error in the receipt. But we are of opinion that the verdict should stand and the postea be delivered to the plaintiff. It is evident the defendant endeavoured to defend his possession on the ground of title not derived from the lessor of plaintiff, but adverse to his right of possession, and under which he claimed an estate for the lives of two persons still in being; this was disclaiming to hold as tenant to the plaintiff, and put an end to all question about notice to quit. Besides this, he failed in the ground on which he rested his right to notice, for he proved no acknowledgment by plaintiff of his tenancy; and the whole complexion of the thing is against the honesty of defendant's case. A tenant for life presuming to make a lease for the lives of three persons of 100 acres of land, at a rent of two shillings and sixpence per year, does not confer such

a right on his pretended lessee as gives him a claim, after the death of the tenant for life, to any particular facilities being granted by the court, for keeping out the person in remainder.

Rule discharged.

MATTHEWSON v. DANIEL CARMAN.

To an action upon a promissory note defendant pleads the non-performance by plaintiff of an alleged contract, to shew failure of consideration: Held—that such contract is not divisible, but must substantially be proved as laid. To the same note defendant pleads a set-off for goods sold and delivered, but evidence at the trial shews that the set-off is confined to the special contract for the sale and delivery of goods out of which the note has arisen: Held—that the goods so delivered could not form the subject-matter of a set-off, but that plaintiff ought to have been sued on his special undertaking.

Assumpsit on a promissory note. Defendant pleaded that the note was given upon an arrangement with plaintiff, whereby plaintiff engaged that he would pay one Miller a certain sum on defendant's account, defendant being indebted to Miller; and he pleads, that plaintiff had not paid Miller as he had engaged to do. Plaintiff replied, denying that the note was given upon such a consideration as is stated in the plea.

Draper, counsel for plaintiff.

Blake, counsel for defendant.

ROBINSON, C. J.—On the trial it was clearly proved, that the note was given partly to cover an acceptance of plaintiff's, for defendant's accommodation, of a bill of 55*l.*, and partly for the balance of timber which defendant had undertaken to deliver to plaintiff by a certain time and to a certain amount, on condition that the plaintiff would settle for the amount of such timber with one Miller, to whom defendant was indebted; and the question is, whether such a defence is in its nature divisible, so that the action upon the note can be sustained only pro tanto, that is, so far as it is supported by a good consideration, in which case the plaintiff's verdict ought to have been confined to the 55*l.* and interest; or whether the plea did not fail altogether, when it was shewn that the note was not given wholly upon such a consideration as was pleaded, in which case the plaintiff must be allowed to recover for the whole sum on the note. It appeared to me at the trial, that as the defence was grounded upon an alleged contract, such contract must, as in other cases, be proved as laid, and that any substantial variance must be fatal, and I directed a verdict accordingly for the whole sum. Another question arose in this case: the defendant had pleaded a set-off for goods sold and delivered, and the evidence he gave of this set-off was confined to the transaction about the quantity of timber, out of which the promissory note arose, and the particulars of which transaction have been already explained. It appeared to me at the trial, that the timber which defendant had delivered to plaintiff upon that agreement could not be made the subject of set-off as for goods sold and delivered, because it was not in fact goods sold to be paid for to defendant on request, but sold to him on a special agreement that he should pay a third party for them, and not the plaintiff. If the plaintiff had failed to settle with Miller for the timber as he engaged to do, he should for that failure, in my opinion, be sued upon his undertaking, and then he might have relieved himself by shewing what the facts were as between

him and Miller. It was not shewn on the trial that Miller had not received credit for the amount of timber which defendant had delivered to plaintiff. By the agreement, which was in writing, plaintiff was not to settle with Miller in any particular manner, though defendant contended that he ought to have taken up certain liabilities which Miller held of his. If Miller got, or was entitled to get credit in any way for the amount of this timber which defendant said he had furnished, then of course it was as so much money paid by defendant to Matthewson for Miller, and defendant would have stood acquitted to Miller as to that amount. I think the verdict is in accordance with the law and evidence.

JONES, J., MCLEAN, J., and HAGEMAN, J., concurred.

CAMPBELL v. CLENCH.

QUÆRE—Under what circumstances the old sheriff, or his late deputy, may proceed to sell lands which had been advertised under a writ of *fi. fa.*, before the new sheriff came into office.

Plaintiff moves that Allan McDonell, Esq., late sheriff of Gore, be restrained from proceeding or acting upon the writ of venditioni exponas put into the hands of his late deputy, and that Angus McDonell, his late deputy, deliver back the said writ to plaintiff's attorney, and that a new writ of venditioni exponas be sued out, directed to the sheriff of the district of Gore; and that in the mean time all proceedings on the part of the late sheriff, or his deputy, on the said writ, be staid.

10th January, 1842, a *fi. fa.* against lands was put into the hands of the late sheriff, Allan McDonell, returnable in Easter Term (February, 1843). Lands were offered for sale on this writ in April, 1843, but were not sold, and on 13th July, 1843, a venditioni exponas was taken out on the return of the *fi. fa.*, returnable last of Hilary then next, and on the 14th August, 1843, sent by plaintiff's attorney to the office of Allan McDonell, Esq., to be executed, as is sworn by plaintiff, *inadvertently* supposing that the late deputy might legally execute it. In April preceding, (1843), Allan McDonell having before that time ceased to be sheriff, and a successor having been actually appointed and in office, left the province altogether, being in insolvent circumstances. His former deputy, Angus McDonell, nevertheless acted on the venditioni exponas, and on 10th November, he informed plaintiff of his intending to sell on the 21st November. Plaintiff, though he conceived that the sale would be irregular for want of being duly advertised, and on account of the late deputy's want of authority, yet sent an agent to attend the sale, and on 21st November, 1843, the land was bid off, by plaintiff's agent, at 2240*l.* Plaintiff, partly induced it seems by the large price which his agent, exceeding his instructions as he alleges, bid for the land, and partly by his doubts respecting the legality of the sale by the former deputy, desires to have the land sold again, on a new writ. The defendant in the *fi. fa.* resists this, though in the affidavit of his agent, filed on his behalf, it is sworn, that the sum bid by plaintiff's agent was below its value.

C. E. Campbell, counsel for plaintiff.

H. J. Boulton, counsel for defendant.

ROBINSON, C. J.—We are of opinion that the proceedings taken under the writ by the person who had been deputy to the former sheriff were,

under the circumstances stated, wholly nugatory: and that a new writ of venditioni exponas may go to the present sheriff, commanding him to sell the lands which the late sheriff had seized under the writ of fieri facias,—of course such writ will not state the lands to be *in the hands of the late sheriff*, for that would be contrary to the fact. We do not determine that where the old sheriff has seized under a writ against lands, he may not afterwards, when out of office, proceed to complete the execution, by selling, upon the principle that execution is one entire thing, and that he who commences should, or at least may, finish it; though in the case of land seized, there is not the same reason why he should act after he is out of office, as in the case of goods seized, because the goods are in his custody by the seizure, he has acquired a special property in them, and is responsible for them; and it would be idle to direct the new sheriff to sell goods of which he has not the possession. We noticed this difference in the case of *Doe dem. Young v. Smith*. But without determining whether the new sheriff may, and should in all cases, either under the old writ or under a venditioni exponas to be issued to him, proceed to sell lands which the former sheriff has seized merely, but not sold, it is clear, that in this case an absurd use has been made of a writ of this court, by making such a sale under it as can answer no purpose to the creditor, and may deceive persons relying upon it hereafter as capable of conveying a title; such proceeding ought not to stand. It is no answer to say that the plaintiff, being himself an attorney, knowingly sent the writ to the person who had been deputy of the former sheriff, and that an agent professing to act under his instructions attended at the sale and bid off the property; for it is sworn, and not denied, that Mr. Campbell's agent did at the sale request Mr. Angus McDonell not to sell, as the legality of such a sale was doubted by Mr. Campbell. He ought then to have forbore, but as he persisted, it is not surprising that the clerk sent there by Mr. Campbell to represent him, should have thought it necessary to take care that the estate went for enough to satisfy the judgment, in case the sale should turn out to be binding. His having actually bid up the property to a sum more than double what was necessary for that purpose, was rendered unavoidable by the fact of the defendant's own agent, who, it is sworn, was the only bidder against him, having run up the bids to that amount. The plaintiff had before the sale written up to Mr. Angus McDonell, telling him that he had not seen the property duly advertised, and that he did not think it could be legally sold; and afterwards, when he found that he seemed resolved to go on with it, he sent up an agent who remonstrated with him against selling on two grounds: first, because it had not been properly advertised as he conceived; and secondly, because he, as the late sheriff's deputy, could not legally sell. Nevertheless Mr. Angus McDonell went on with the sale, though his only authority for acting (so far as the affidavits shew) was that he had been the deputy of a sheriff who eight months before had retired from the office, and who then moreover was no longer a resident inhabitant of this province, but had removed to a foreign country. It is plain that under such circumstances Mr. Angus McDonell had nothing to do, as sheriff's deputy, with the process of the court, and ought not to have assumed to act upon it. Neither his former principal, nor the sureties of his principal, were responsible for his act, for

he was clearly not authorised to represent the sheriff, his deputation having ceased when the principal retired from office. The statute 3 Will. IV., ch. 8, sec. 23, does not extend to any case of vacancy except by death. He ought not to have proceeded, and more especially against the expressed wish of the plaintiff in the execution. It is impossible to look upon any one as having a legal or just interest in upholding a sale made under such circumstances.

Rule absolute.

SPALDING v. ROGERS ET AL.

The original public allowances for road made in the first survey of a township, continue to be public highways, notwithstanding a new road, deviating from any such allowance, may have been opened under the provisions of the statute 50 Geo. III., ch. 1, or may have been confirmed as a highway by reason of statute labour or public money having been applied upon it.

The defendants justify, setting forth in one plea, that the locus in quo is a public highway, and being wrongfully obstructed by a fence placed in it by plaintiff, they entered, as by law they might, and abated the nuisance. And in another plea they justify under an order of the justices in sessions to Rogers, one of the defendants, to open the highway, he being an overseer of highways duly chosen; and the defendants, persons acting lawfully in his aid. The plaintiff replies to both these pleas, denying that the locus in quo is a common and public highway. The question presented by this case is an important one, for it may be raised, as we apprehend, in a number of instances. The plaintiff, and Rogers, one of the defendants, are proprietors respectively of two lots of land lying on opposite sides of the public allowance for road, between the broken front and first concession of the township of Haldimand, the plaintiff's lot being on the south side, and Rogers' on the north side of the allowance. On account of a ravine which runs along the public allowance for road at this point, the inhabitants in the first settlement of the country adopted of their own accord, and without any public authority for the change, a line to the north of the allowance, encroaching upon the front of the plaintiff's lot. This road has been in actual use thirty or forty years, and statute labour having been applied upon it, it has become a common and public highway, under the 12th section of the Road Act, 50 Geo. III. ch. 1, and so continues, having never been altered by any public proceeding such as the statutes have authorised. The original public allowance for road in that part of the line has never been in use as a highway. The plaintiff, Spalding, as it was lying useless and unoccupied, extended his fence across this allowance for road so as to embrace the whole or very nearly the whole of it; and he has kept it thus enclosed for more than twenty years before this action brought, without being interrupted in the enjoyment of it. Now the country around having become populous, there is no difficulty in making a road through the broken ground occasioned by the ravine, and the defendant Rogers, and others, desired to open this public allowance, so as to continue the road in a straight line as intended by the original survey, and they entered the close for that purpose. The jury found a verdict for the defendants, which the plaintiff has moved to set aside, as

being contrary to law and evidence and the direction of the learned judge who tried the cause.

Wilson, counsel for plaintiff.

Sullivan, counsel for defendant.

ROBINSON, C. J.—We are of opinion, that the defendants were entitled to prevail at the trial, and that the verdict in their favour therefore must stand. The issue upon the two special pleas rests the case wholly upon the one single point, whether the locus in quo was at the time of the alleged trespass a common and public highway. It is admitted by the replications that the defendants' entry was lawful, if it was a public highway; there is therefore no room for entering into the question of the legality of the justice's order set out in one of the pleas, or of the right under the circumstances to all persons to enter and abate the obstruction which is relied upon in the other plea. Neither are we at liberty to consider the effect of the plaintiff's long peaceable occupation of this road allowance, upon the right of the crown, or as a protection against strangers trespassing upon his possession. The only fact which the jury was sworn to try under the special pleas was, whether the locus in quo was a common public highway or not. If it was, then all other facts necessary to make out the defence pleaded are admitted by the replication, and it is not denied that they would constitute a good defence in law. Then as to this point whether it was a common public highway or not. It was expressly submitted to the jury upon the evidence to find whether the locus in quo was within the space which in the original survey of the township constituted the road allowance. They found that it was, and their verdict was in accordance with the evidence. This being so, then the same space must, in our opinion, be regarded as being still a common and public highway, for any thing that was shewn upon the trial to the contrary. We know of no former decision of this court conflicting with this opinion. There have been cases in which, where the original allowance laid out by the surveyor was deemed unfit for a road, the government had by some public act shewn a resolution to abandon it, and had corrected the survey by laying out another line of road. In any such case occurring before the statute of 1810, it has been held that the old abandoned line was not confirmed or rather restored and made a highway under the 12th clause of that act, because the provision only applied to such original allowances as at the time of passing the act were still recognised by the government as subsisting allowances for road, not to such as had in the mean time been changed by the same authority that had created them. But this is not a case of that kind. Here, as in hundreds, perhaps thousands of other cases, the inhabitants have merely of their own accord deviated from the public allowance a little, in order to get upon better ground; and though by the subsequent application of statute labour before the year 1810, such travelled line has become a public road under the clause already referred to, yet it does not follow that the original allowance laid out by the surveyor has ceased to be a common public highway. The owner of the adjoining lot on either side has clearly no right to extend his grant so as to inclose or fence any part of it; and strangers can of course have no such right. It must be allowed to lie open as the public allowance, or the person whose lot lies on one side of it, might be unable, without trespassing on his neighbour or on the

crown, to get into the travelled road. And this further inconvenience would follow, that the public authorities of the district or township could never restore the road to a straight line, according to the original intention, when it had for temporary convenience been departed from, for reasons which cease to operate after the country has become clear, and statute labour abundant. We must all have known many instances when a crooked line, which for many years had been spontaneously adopted by the inhabitants, has been abandoned, and the road made straight along the original line, without its being thought necessary to resort to any public proceeding for that purpose. Indeed the statute 50 Geo. III. ch. 1, sec. 12, in words decides the question, for it enacts that all allowances for roads made by the king's surveyors in any township, shall be deemed common and *public highways*, unless such road had been already altered according to law (which this has not been), or shall be altered according to the provisions of that act; and it is not pretended that this road has been so altered. It seems to have presented itself to the learned judge as a question, at the trial, whether the effect of doing statute labour on the crooked road before the year 1810, might not be to substitute such crooked road for the straight line, under the operation of the statute, but we think it has not such effect; it has never, that we are aware, been so considered by this court. It seems contrary to the spirit of the various enactments on that subject, and it would in many cases operate very inconveniently, if the using of the one road, even till it was confirmed as a highway, were ipso facto to cancel the old allowance, so that the people of the country had no right of way over it. The legislature perceived this, for having by statute 50 Geo. III., ch. 1, sec. 9, authorised the old allowance to be sold when a new line should be sanctioned by a proceeding under this act, they afterwards, by 4 Geo. IV., ch. 10, repealed that provision. We consider that the issue being solely whether the locus in quo is a "*common and public highway*," and the statute of 1810 making it, until altered by proper authority, "*a common and public highway*," the issue was precisely proved for the defendant, and that this rule therefore must be discharged.

Rule discharged.

MCLELLAN, EXECUTOR, &c. v. McMANUS.

Where a defendant pays for plaintiff orders in favour of third parties, such payments may be given in evidence as items under a set-off, and need not, in order to their admission in evidence, be pleaded as payments on account; and where a defendant delivers his particulars of set-off on a day later than that appointed by a judge's order, and the plaintiff's attorney, through his clerk, accepts the particulars, keeps them in his possession, and gives no notice of his refusing to receive them *as not in time*, such conduct is a waiver of all objections, on the ground of delay, to defendant's right to go into evidence of his set-off.

Assumpsit—common counts. Defendant pays into court £3 15s., and pleads to the residue non-assumpsit, and a set-off for goods sold, and for money lent and advanced, and *money paid for* plaintiff, and on account stated—there is *no plea of payment*. On the trial, evidence was given that before the work was done for defendant by the testator, the latter was indebted to the defendant, and that it was on that account he was employed to do the work; there were also proved some charges for orders, paid by defendant to third parties in cash and in goods. Verdict

was rendered for 16*s.* 8*d.* Plaintiff moved to add £15 to his verdict, on leave reserved at the trial, on the ground that what were attempted to be proved as set-off were payments on account of this demand, and not items of set-off; and if they could be treated as set-off, still they were inadmissible, because defendant had not delivered particulars of his set-off, agreeably to a judge's order obtained for that purpose and served on him.

Blake, counsel for plaintiff.

G. Duggan, counsel for defendant.

ROBINSON, C. J.—We think these were fairly items of set-off, and not merely payments; as to any part of the defendant's account which was due to him before the work was done, of course that was not payment of a debt not yet existing. And as to the orders paid to third parties, though it may be very probable that defendant would not have paid those orders if he had not been in debt to the plaintiff, yet they were not in strict form payments on account; they constituted cross demands. Then with respect to the objection, that the defendant was precluded from going into his set-off, by having delivered his particulars a day later, than was appointed by judge's order, we are of opinion, that the clerk of the plaintiff's attorney having received the particulars in the way he did, and no notice having been afterwards given by plaintiff's attorney that he would not accept them as *in time*, his keeping them and not returning them may be treated as a waiver of the objection in the ground of delay. The case of *Lovelock v. Chevely* (*a*), is in point. We think, therefore, that this rule must be discharged, and defendant will thus retain the benefit of his set-off proved at the trial.

Rule discharged.

MATTHEWSON *v.* BROUSE.

Where a person having taken from his debtor a note of a third party indorsed by the debtor, as a security for a portion of his debt, takes afterwards a mortgage from his debtor for the whole sum due him, appointing a day for payment more distant than that on which the note is to fall due, and with the usual covenant in the mortgage to pay the money,—Held, that the remedy against the debtor, as indorser of the note, is extinguished by the taking the mortgage for the same debt,—there being no reference made in the mortgage to the note, as being an outstanding security for the same debt.

Defendant is sued as indorser of a promissory note made by one Carman. Upon the trial, the following appeared to be the facts:—Matthewson having recovered a judgment in Lower Canada against Brouse, had taken execution against his body, and Brouse was thereupon imprisoned in gaol at Montreal. While he was lying in gaol he offered Matthewson to transfer to him certain promissory notes of one Carman, if he would consent thereupon to discharge him. Matthewson declined, unless Brouse would, in addition to the proposed notes, give a mortgage upon some lands of his own for the whole amount of the debt for which he was in custody. Brouse agreed to do this, and Carman accordingly gave his notes on the 11th November, 1842, for the amount agreed upon. The note sued upon was one of those. It was made by Carman, payable to Brouse, or order, and indorsed by Brouse; being payable in ninety days,

(*a*) Holt's N. P. C. 552.

it fell due on 14th February, 1843. On the 16th November, Brouse gave a mortgage upon certain lands, according to his agreement, to secure the debt due by him. It contains a covenant in the usual form to pay the amount due on or before 4th March, 1843. The mortgage was executed by both parties, and was on the face of it an absolute and sole security for the debt, not reciting or making any reference to the notes, or to any other security for any part of the same debt, nor containing any thing on the face of it to import that it was taken as a collateral or additional security. Upon the record, among other defences, defendant pleads that after the making of the promise charged in the declaration, and before the commencement of this suit, viz. 16th November, 1842, he secured to the plaintiff by mortgage the sum of 512*l.* 10*s.* 4*d.*, of which sum the amount payable by this note, being 256*l.* 10*s.* 8*d.*, was parcel; that the mortgage contained a covenant by defendant to pay to plaintiff the said sum of 512*l.* 10*s.* 4*d.* on or before 4th March, 1843; and that plaintiff accepted and received from defendant the said mortgage and covenant in full satisfaction and discharge of the promise in the declaration.

The plaintiff replies to this plea, that he did not receive or accept the said indenture of mortgage in full satisfaction and discharge of the promise in the declaration mentioned.

Draper, counsel for plaintiff.

Vankoughnet, counsel for defendant.

ROBINSON, C. J.—Upon the trial before me at the last assizes at Brockville, I directed a verdict upon the last issue to be entered for defendant, subject, by consent of both parties, to leave for the plaintiff to move to have a verdict entered in his favour for the amount of the note and interest, if the court should be of opinion that the claim against defendant in the note was not merged in the higher security, and that the plaintiff was still entitled to sue upon it. At the trial, the plaintiff proved only the signature of defendant as indorser, and closed his case without attempting or desiring to offer any explanation of the intention or understanding of the parties in taking the notes and the mortgage. The defendant then objected that due notice of dishonour had not been proved, and the plaintiff, contending that according to the law of Lower Canada the notice was sent in time, begged to be allowed to prove, what he had inadvertently omitted, that the note was indorsed by defendant in Lower Canada. Though it was resisted by defendant, I permitted him to call a witness for this purpose; and he stated that fact, and that the notes and mortgage were delivered to Matthewson on the same day. If it would have been material to have proved by parol evidence that there was any understanding between the parties at the time that the remedy against Brouse on the bill should not be affected by his giving afterwards a higher security for the same debt, I have no note that any such evidence was given, nor any recollection that any was offered. I believe that no evidence was rejected that was offered. The question before us is whether upon the facts appearing as stated, the taking the mortgage from Brouse for the amount intended to be secured by Carman's notes, extinguished the claim against him for the same money as a party upon Carman's notes, which he had indorsed before making the mortgage. The defendant, it must be observed, has expressly averred in his plea that the plaintiff accepted the mortgage and covenant in full satisfaction and dis-

charge of the promise in the declaration; and this the plaintiff joins issue upon. There was no evidence given of any agreement or understanding upon the point. If it is the legal effect of giving the covenant for the debt due on the note to extinguish wholly the antecedent simple contract debt, then it was unnecessary for the plaintiff to have set forth as a fact that which was a mere legal inference from other facts stated; but having stated it, I think he may nevertheless rely upon the plain legal effect of the sealed instrument for substantiating his plea. If the law makes the one an extinguishment or discharge of the other, then it must be intended to have been given on the one side and accepted on the other, according to the effect, and for the purpose which the law ascribes to it, where nothing to the contrary is shewn. I take it then to be a clear principle of law that "if a man accepts an obligation for a debt due by simple contract, this extinguishes the contract, though the acceptance of an obligation for a debt due by another obligation is no bar to the first obligation," (because it is not a higher security) (a). If Brouse, on the 11th November, had made a note to Matthewson for the sum due to him, payable on 14th February, and had afterwards given him a mortgage for the same debt, with a covenant to pay the money on the 4th March, it is clear that the debt due on simple contract would be merged in the higher security, and there would no longer remain to Matthewson a remedy on the note. But I see no substantial difference between that case and the present. Every indorser of a promissory note is as a new maker, and in effect Brouse did, on 11th November, give his note to Matthewson for the money he owed him, with this difference only, that his promise to pay was a qualified one, that he would pay the money if Carman (the maker of the note) did not. Then when, after having thus become a debtor to Matthewson on simple contract, he gave his covenant, under seal, to pay him absolutely the very same money, but on a more distant day, there is in my opinion an end of his liability on the note. If Brouse had never been taken in execution, but while the judgment was in force against him had transferred Carman's notes as a collateral security, he could not, I apprehend, have been sued as indorser of the notes, while there was a judgment in force against him for the same debt, though the notes would be available securities against other parties. So, if Brouse had before given a mortgage to Matthewson, covenanting to pay his debt in March; and had in the mean time transferred to him notes of Carman or others falling due at an earlier period, he could not on their failure (while the notes were still in the same creditor's hands,) have been made to pay his debt forthwith, because he had indorsed the notes while he had given his covenant for the same debt payable at a later day. Twopenny et al. v. Young (b), and Schack et al. v. Anthony (c), are authorities, I think, to shew that where a security under seal is given for a debt, it extinguishes any pre-existing simple contract for the same debt between the same parties, unless there is something in *the instrument itself* to shew that it was intended only as a *further security*, and that the remedy on the simple contract was to remain. I find no authority for saying that the legal effect of the covenant can be altered, by parol evidence of an agreement

(a) Bac. Abr. Debt. G.

(b) 3 B. & C. 210.

(c) 1 M. & S. 575.

or understanding that does not appear in it (*a*). In *Roades v. Barnes* (*b*), Lord Mansfield says—"A promissory note cannot be pleaded" in bar, "to an action on simple contract, although a bond may, because it extinguishes the debt"—*Hackshaw v. Clerke* (*c*). The court seemed to think that the party in such a case might even deny the simple contract, by pleading the general issue; but that may be questioned—*Acton v. Symon* (*d*). I do not see anything to distinguish this case from any other in which a party having given a note to pay a debt in three months should give a covenant under seal to pay the same debt in six months; and it is repugnant, in my opinion, to say that a man may owe a sum of money to another on a note payable at one time, and the same sum upon a specialty payable at another time. If the mortgage had mentioned the notes, and reserved to the plaintiff the right to sue Brouse upon them, because he had indorsed them, then I suppose the rule of law would not have applied, because *conventio vincit legem*; but I cannot conceive why any such reservation should be made in any case, and I see nothing in what was proved to imply it. Mr. Justice Bayley, in his Treatise on Bills (267), says—"The difference between extinguishment and satisfaction is to be remembered—the holder's claim upon a bill or note may be extinguished as to some parties, and remain entire as to others. Taking security of a higher description, as a bond or judgment for the money due upon a bill or note, extinguishes the holder's claim upon the bill or note *as against the party giving that security*." It does not seem to me at present that parol evidence could have been received to vary the effect of the mortgage itself; but none such, as I believe is now admitted, was offered; that is no evidence of any agreement expressed between the parties, that the debt on the note and on the mortgage should both stand against the party. And I did not understand Mr. Steele that they were able to have given evidence of any thing being said upon the subject. The facts are thus left to have their legal effect. I am of opinion that verdict should be entered for defendant. *but* The other judges concurred.

IN THE PRACTICE COURT.

DOE DEM. J. ANDERSON *v.* THOMAS ANDERSON.

Where in ejectment a defendant appears, and enters into the usual consent rule, and obtains an order to stay proceedings until security for costs be given, and the plaintiff subsequently serves new declarations, such subsequent proceedings will be stayed until the costs in the former suit are paid, even though the plaintiff had not joined in the consent rule.

This was an application by the defendant to stay the proceedings in this cause till the costs of a former action brought by the plaintiff against him upon the same title were paid. In the former action the defendant appeared, and entered into the consent rule. He then obtained an order to stay the proceedings until security should be given for costs, the lessor of the plaintiff being an infant resident abroad. The plaintiff did not join in the consent rule, and subsequently delivered new declarations against the defendant and George Anderson. It was objected, by the counsel for the plaintiff, that not having joined in the consent rule, the plaintiff was not

(*a*) 1 Cowper, 47. (*b*) 1 Burr. 9. (*c*) 5 Mod. 314. (*d*) Cro. Car. 415.

liable for costs, and therefore the defendant must fail in his application, and that the defendant must shew the proceeding on the part of the plaintiff to be vexatious.

JONES, J., (P. C.)—In *Smith ex dem. Ginger v. Barnardiston* (*a*), the proceedings were stayed till the costs of a previous action were paid, the plaintiff never having joined in the consent rule. The application was resisted, upon the ground that no costs were payable till the plaintiff had joined in the consent rule, but the court considered it a case of manifest vexation, and stayed the proceedings. (*b*) The plaintiff does not shew that this action is not brought expressly to avoid giving security for costs (*c*), and therefore the proceedings should be stayed till he does so, or gives some good reason for bringing the second action. Where the plaintiff brought his action upon the demise of a wrong person, and before trial brought new ejectments, the proceedings in the latter actions were stayed till the costs of the first were paid. (*d*) And it is immaterial whether the first action is against the same party, if the title is the same as that on which the second action is brought, and a privity exists between the parties made defendants. In *Doe James Anderson v. George Anderson*, a similar rule was discharged with costs, there being no privity of estate between Thomas and George Anderson.

Rule absolute.

ENGLISH *v. EVERETT.*

Where proceedings in a court of inferior jurisdiction have been removed into the Court of Queen's Bench, a rule nisi to set aside the proceedings had in such court, for irregularity, will be granted.

The defendant had been arrested, at the suit of the plaintiff, for 18*l.*, on a writ of habeas corpus issued out of the Bathurst District Court; a writ of habeas corpus was issued to remove the proceedings into the Court of Queen's Bench.

Mr. A. Wilson now moves that the habeas corpus issued last term to the judge of the Bathurst District Court, with the return thereto, be filed, and for a rule calling upon the plaintiff to shew cause why the arrest made in the cause should not be set aside for irregularity; the plaintiff having stated in the affidavit to hold to bail that he was apprehensive the defendant would leave that part of the province formerly Upper Canada, instead of the province, as required by the statute 7 Vic. ch. 31, sec. 1.

JONES, J., (P. C.)—Rule granted.

COLE *v. McFAUL.*

A sheriff who has seized under a *f. fa.* goods and chattels, the property in which is disputed, will not be relieved under the statute 7 Vic. ch. 30, where the application for relief is not made until after the return day of the writ—unless the delay is satisfactorily explained.

Mr. Brough, on behalf of the sheriff of the district of Prince Edward, moved for a rule, calling upon the plaintiff and one Daniel McFaul to shew cause why they should not maintain or relinquish their respective claims to goods taken in execution in this cause, and why such order should not be made therein as to the court should seem fit, pursuant to the statute 7 Vic. ch. 30.

(*a*) 2 W. Black. 904. (*b*) 5 B. & Ad. 684. (*c*) 1 St. 554. (*d*) 1 Str. 548; 4 E. 585.

JONES J., (P. C.)—By the affidavit of the sheriff, it appears that a *fi. fa.* against the goods and chattels of the defendant was delivered to him to be executed, returnable on the first day of this present Michaelmas Term; that shortly after the receipt of the writ, and before the return day thereof, he seized goods and chattels supposed to belong to the defendant, he having made use of the same as his own property, and which goods and chattels one Daniel McFaul claims as his own. The writ was received by the sheriff on the 29th day of June last, and he seized under it, as he says, shortly after; no specific time is alleged. The writ was returnable on the first day of this term, and it is now too late, on the last day, to make this motion, without any explanation as to the cause of the delay in making the application (*a*).

DOE DEM. JACOB AUSMAN v. TIMOTHY MUNRO.

Where at nisi prius leave was granted to a plaintiff in ejectment to amend the record by altering the name of the lessor of the plaintiff, and neither the amendment nor any order for it on the record or postea was made at the time, the defendant will not be allowed subsequently on affidavit to make it.

At the trial of this cause the plaintiff moved to amend the nisi prius record by changing the name of the lessor of the plaintiff to that of Henry Ausman. The amendment was ordered by the learned judge, but was not in fact made, nor the order indorsed upon the record or postea. A verdict was taken for the plaintiff, subject to be set aside by the court above, and a verdict entered for the defendant upon a point reserved. Afterwards, in Trinity Term, the verdict for the plaintiff was set aside, and a verdict entered for the defendant. The defendant now moves to amend the nisi prius record postea, and consent rule, by changing the name of the lessor of the plaintiff from Jacob Ausman to Henry Ausman, upon the above facts stated upon affidavit.

JONES, J. (P. C.)—I see no authority in ordinary cases to amend the name of the plaintiff at the instance of the plaintiff himself, nor in ejectment to amend the name of the lessor of the plaintiff; and in a case in Str. 548, it appears that where a demise was made of a wrong name, the plaintiff delivered new declarations (*b*).

Rule discharged.

GOSLIN v. TUNE.

A judgment entered on cognovit, without filing common bail, is irregular, and will be set aside with costs.

Motion by *Mr. Crawford*, to set aside a judgment entered upon a cognovit, and all subsequent proceedings, for irregularity, with costs, no common bail or declaration, or incipitur thereof being filed; and also upon the ground that the debt and costs had been fully paid and satisfied before the entering of judgment. The plaintiff moves for leave to amend, by filing a declaration, or incipitur of declaration, and a common bail piece.

JONES, J., (P. C.)—The plaintiff's rule must be discharged, with costs, and the defendant's rule, to set aside the judgment, &c., be made absolute.

(*a*) 2 Dow. 11, 621; 1 Dow. 548; 3 Dow. 567, 590. (*b*) 1 Salk. 48.

The want of common bail is a defect, and not an irregularity merely, and cannot therefore be cured by amendment. (a).

MICHAEL MC CUE v. ANDREW TODD.

Under the statute 7 Vic. ch. 31, sec. 6, the court will not punish a defendant by commitment, unless upon his examination the cause of action, and the circumstances connected with it, would clearly warrant the court in taking such a course. No improper conduct being proved against the defendant when brought up for examination under that section of the act, the court declined to commit him, leaving the plaintiff to recover satisfaction upon his judgment against the lands and goods of the defendant.

The defendant appeared before the court pursuant to a notice, served under the 7th Vic. ch. 31, sec. 6, and was examined *vivâ voce*. He had been arrested and held to bail in trover, upon a judge's order, and judgment was recovered against him upon confession for about 20*l.* since the last term. Upon the examination it appeared, that the defendant had, several years since, assigned his furniture (which at this time he swore was worth less than 20*l.*) to his mother-in-law, who then resided with him and who is since dead, for a debt alleged to have been contracted in England before the removal of the defendant to this country. The mother-in-law died some years since, having previously assigned the property to her sister Martha Porter, a helpless old woman, seventy years of age, residing with the defendant. The mother-in-law and aunt both came to the country with the defendant and his family. The defendant stated that he was possessed of no property, and that the debts due him did not exceed the sum of 5*l.*, and that they were doubtful; that he is transacting business in this town as a land-agent, upon which monies will be due him upon the ultimate decision of the claims in favour of his clients; that he has not a shilling in cash, and lives and supports his family by what he can earn from day to day in his business. The defendant expressed his willingness to assign his debts to the plaintiff, and any claim which it might be considered that he had upon the furniture in his house, which upon sale would prove insufficient to pay the rent due to his landlord.

JONES, J., (P. C.)—The recovery being in a cause arising *ex delicto*, the court has the power to commit the defendant for a time not exceeding twelve months, as a punishment for the "tort," if the court in its discretion deem proper so to do. No particular examination was had as to the cause of action or the circumstances connected with it, so as to enable the court to form any opinion of the motives or conduct of the defendant in the transaction; it does not therefore appear to be a case calling for punishment, when we consider the object of the provision under which the court acts, and the spirit of the legislature in passing the law; and as no motion was made upon the examination, I shall make no order in the matter. The defendant having appeared according to the undertaking of the bail upon their recognizance, the bail are entitled to have an *exoneretur* entered upon the bail-piece, and the plaintiff's remedy for the recovery of satisfaction upon his judgment is against the lands and goods of the defendant.

Rule discharged.

DOE EX DEM. SUTTON v. BALL.

In ejectment, all proceedings prior to the entering into the consent rule, must be entitled in the cause against the casual ejector.

Application by *Mr. Boomer*, for leave to enter into a special consent. *JONES, J. (P. C.)*.—I think there is no such cause as *Doe Sutton v. Ball*, until Ball shall have appeared and entered into the consent rule—the title of the cause is *Doe Sutton v. Roe*. This application of the defendant is to enter into a special consent rule; and such application, it appears to me, must be in the action against the casual ejector.

Rule discharged.

DOE ANDERSON v. TODD ET AL.

A cause is not at issue, and a rule for judgment, as in case of a non-suit, will not be granted where the similiter is not filed. Semble—that where a plaintiff has been prevented by the defendant from proceeding to trial, a rule for judgment, as in case of a non-suit, will be discharged on the peremptory undertaking without costs.

This was an application for judgment, as in case of a non-suit for not proceeding to trial according to the practice of the court. No similiter was filed.

JONES, J. (P. C.).—Issue is not joined till the similiter is entered, and judgment, as in case of a non-suit, cannot be moved till that is done (*a*). There are cases decided since the rule which authorises the plaintiff to enter the similiter at any time where the last pleading concludes to the country. But if the cause had been at issue, I should have discharged the rule upon the peremptory undertaking, without costs. The plaintiff served an irregular notice of trial for the last assizes. The error was discovered on the day after that on which he could have given regular notice, and he offered to the defendant to go to trial on that day, and he declined, under such circumstances, he could scarcely ask for costs if any had accrued. I think it is only where the plaintiff has failed to try the cause pursuant to notice that the rule for judgment is discharged upon the peremptory undertaking with costs.

Rule discharged.

ELVIGE v. BOYNTON.

Semble, that when a plaintiff has given notice of trial, a rule for judgment, as in case of a nonsuit, will be made absolute, even though the cause is not at issue, no similiter having been entered; unless that fact is shewn in answer to the rule.

Mr. Saxon, on the part of the defendant, moved for judgment as in case of a non-suit, for not proceeding to trial pursuant to the practice of the court. The affidavit did not state that the cause was at issue, but that notice of trial had been given and countermanded.

JONES, J. (P. C.).—It has been frequently held, that the affidavit must state expressly that issue has been joined; but the case of *Cabyn v. Heyworth* (*b*), decides that notice of trial by a plaintiff is *prima facie* evidence that issue has been joined, because, without that, the notice would be nugatory; but here it is shewn affirmatively that issue has not been joined, no similiter having been entered.

Rule discharged.

(*a*) 2 Dowl. 691; 3 Dowl. 705; 7 Dowl. 19.

(*b*) 5 Scott, 335.

JOHNSON v. HUNTER.

Under the rule prohibiting the use of several *pleas*, &c., founded on one and the same principal matter, a judge has power to strike out any such pleas. The rule which declares that several *counts* varying merely in the statement of the same subject-matter of complaint shall not be allowed, has reference merely to the taxation of costs, and does not forbid the use of them.

Motion to strike out two of the three pleas of the defendant.

JONES, J. (P. C.)—The 5th rule Hil., 4 Will. IV., declares, “that several counts shall not be allowed unless a distinct subject-matter of complaint is intended to be established in respect of each, nor shall several pleas, avowries, or cognizances be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each;” and superfluous counts and pleas are constantly struck out by a judge on application by the parties under the authority of the 6th rule. Our 32nd rule is precisely the same as the 5th rule above, as it regards counts, except that the words “in taxation of costs” are added after the word “allowed.” It does not therefore prohibit the use of several counts under any other penalty than the loss of costs upon them. Our 33rd rule embraces that part of the 5th English rule which relates to pleas, and declares “that pleas, avowries, and cognizances founded on one and the same principal matter, but varied in statement, description, or circumstances only, are not to be allowed.” These are distinctly declared *not to be allowed*; not that like surplus counts, they are not to be allowed “in taxation of costs.” And therefore, although there is no express rule like the 6th English rule, authorising a judge to strike out a plea filed in violation of the rule, still I think a judge has such power where the rule is clearly violated. I think the pleas admissible, and that none should be struck out. Rule discharged.

JOHNSON v. BALDWIN.

Where a sheriff obtains a rule under the statute 7 Vic. ch. 30, calling upon parties to sustain their claims to property seized under execution, and one party fails to appear, his claim as against the sheriff is barred; and the party appearing is entitled to have his costs paid by the party failing to appear.

A rule was issued at the instance of a sheriff, under the statute 7 Vic. ch. 30, sec. 6. The plaintiff appeared, but the adverse claimant failed to appear and support his claim.

JONES, J. (P. C.)—In this case the rule must be made absolute, by which the adverse claimant is barred as against the sheriff, and the plaintiff is entitled to his costs for appearing on the sheriff’s rule, to be paid by the adverse claimant (*a*). But, as the rule does not pray for costs, a rule nisi must issue, calling upon the adverse claimant to shew cause within four days why he should not pay the costs (*b*).

BROWN v. SIMMONDS.

In entitling an affidavit in a cause, the additions of “plaintiff,” and “defendant,” must be inserted.

Motion by defendant for judgment as in case of a non-suit, for not proceeding to trial pursuant to the practice of the court.

The plaintiff takes a preliminary objection to the affidavit upon which the motion is founded, it being entitled *James Brown v. Henry P. Simmons*, not adding plaintiff, or defendant.

JONES, J. (P. C.)—However captious or trifling such an objection may appear, after the decision *Harris v. Griffiths and others* (*a*), we must give effect to it.

Rule discharged without costs.

IN THE QUEEN'S BENCH.

MAXWELL v. RANSOM.

Where damages have been assessed in a cause subject to a demurrer, and the demurrer is decided against the party assessing damages, the court does not hold itself precluded from allowing an amendment in the pleadings demurred to.

Plaintiff declares on an arbitration bond.

Defendant craves oyer, and pleads, first, non est factum ; secondly, no award made.

Plaintiff replies, setting out an award.

Defendant rejoins, re-affirming that the arbitrators made no award within the time, because at the time of the submission a large sum was due from plaintiff to him for work and labour, &c., and that this claim was a matter in controversy at the time of the submission, and if it had been taken into consideration, the award would have been in favour of plaintiff; that the arbitrators had notice of this claim, but did not award upon it.

Plaintiff demurs because this is a departure from his plea of nul agard.

The court so decided, and gave judgment in his favour ; whereupon defendant moved to amend his pleadings by striking out the plea of nul agard, and pleading the other plea in his defence.

Plaintiff had taken the cause to trial, and assessed contingent damages on the demurrer.

The question was, whether, under the circumstances, defendant should be allowed to amend his pleading.

Blake, counsel for plaintiff.

Van Koughnet, counsel for defendant.

ROBINSON, C. J.—This is not the case of a defendant having put in a groundless demurrer to plaintiff's pleadings : the defence, if the facts sustain it, is a good one on the merits, and would have shewn the award void, if defendant had, as in 16 E. 58, (*Mitchell v. Stavely*), pleaded it in the first instance, either with or without a plea of nul tiel agard. He has probably been misled by *Fisher v. Pimbley*, 11 E. 188, supposing that it had over-ruled all previous authorities, and not noticing that it was a case where the award was bad on the face of it ; so that if plaintiff had set it out in his replication, defendant might have demurred ; and as plaintiff did not set it all out, but only a part, defendant set out the whole and demurred, and this after he had pleaded nul tiel agard. The cases are wholly unlike : defendant there had no necessity of pleading any

(*a*) 4 Dow. 289.

extrinsic matter, which would be a departure; here he had (*a*). The questions upon the amendment are, 1st—If the affidavits shew *prima facie* good matter of defence on the merits, shall defendant be precluded now from pleading it properly? 2nd—Do they shew such defence? On the first point; it is after record taken to trial; and *Robinson v. Rayley* (*b*), is relied upon. But the defendant cannot prevent the plaintiff from trying the issues before the demurrer is determined, and the supposed technical difficulty on which that case was decided has been often disregarded in later cases. We have determined in other cases that this is not an insurmountable obstacle, though in England they seem rarely, if ever, to allow amendment after trial, and judgment on demurrer. The affidavits here are contradictory: the award was made six years ago. It may be reasonably asked, Why did not defendant move against the award. He wishes to amend now, in order to open an award made in 1838, and not moved against. On the other hand, it is no less reasonable to ask, Why should plaintiff have forbore so long to enforce the award? It seems rather to argue a consciousness that he ought not to act upon it, and so far the delay corroborates the affidavits filed on the part of the defendant. Considering that this defendant might, on the authority of several cases, have supposed that he could plead the matter of defence as he has done, and that it is a substantial defence on the merits, if true; considering also that he has lain by so long upon a plain demand of this nature, and that all the witnesses who can speak to the question of fact relied upon as a defence are still living, so that there is no reason for apprehending difficulty in bringing the facts on which the case ought to turn before the jury, though at this late day; we allow the defendant to amend his pleading, imposing it, however, as a condition, that he shall admit of Mr. Crysler's affidavit being read in evidence on the trial, if it should be impossible from illness or absence to procure his attendance, and of course on payment of costs.

Rule absolute, on payment of costs.

DOE DEM. O'REILLY *v.* PICKLE.

Where the declaration in an action of ejectment designates the property sought to be recovered by the lot and concession of a township, without mentioning the quality or description of land, the declaration is sufficiently certain.

Plaintiff in his declaration stated a demise of "part of the north half of Lot No. 5, and the north half of Lot No. 7, in the 7th concession of the township of Burford; that by virtue of the demise he entered into the *said tenements*, and was possessed thereof until the defendant ejected him from his *said farm*." No other description was given of what plaintiff seeks to recover—nothing said of *land*, or wood, but merely as above.

Eccles, counsel for plaintiff.

H. J. Boulton, counsel for defendant.

ROBINSON, C. J.—I am of opinion that the declaration is sufficient. If the object is certainty, and that the sheriff may know of what he is to give possession, the designation by lots and concessions is the best possible: it is a mode of description sanctioned by public authority, universally recognised and understood. The legislature has passed acts to

(*a*) 4 T. R. 588. See 2 Chitty, P. C. "Departure." (*b*) 1 Burr. 322.

facilitate and ensure the means of ascertaining the true boundaries of lots according to their numbers, and if common sense is to have anything to do with the decision of this question, it would be manifestly absurd to hold this description of the land claimed as bad for uncertainty. On the authority of *Cottingham v. King*, Burr. 621, *Joans v. Hoel*, Cro. Eliz. 235, and the observation made by the court in *Knight v. Syms*, 4 Mod. 97, I think we may hold this declaration good. It is true, that declaring for a close merely by name has been often held to be insufficient; and in 4 Mod. 97, the reason is given. The court say, "Names of places are neither necessary nor material in giving possession, because they often change with the properties; and the sheriff must have sufficient notice out of the record itself to give possession." This reason is wholly inapplicable to land in this country, designated by the proper lot and concession, for that is a name not liable to change at the will of the proprietor, but known and recorded in public offices of the government, and sufficient to direct the sheriff with certainty; better indeed than any mode in use in England, or any other mode that can be adopted here.

Rule discharged.

BALDWIN ET AL. v. MONTGOMERY.

Counsel can sustain actions for such fees to be paid to themselves by their clients, as are established according to the table of fees under the 45th section of the statute 2 Geo. IV., ch. 2; but where the fees claimed are not such as come within this provision of the act, the general principle of law in force in England applies equally to this province, and counsel have no right of action for fees generally.

Plaintiffs declare on common counts, for money lent, money paid, money had and received, goods sold and delivered, work and labour generally, and an account stated. Defendant pleads general issue, and a set-off. Verdict for plaintiffs, 24*l.* 18*s.* 0*d.* The demand was in fact by plaintiffs, as attorneys, for bills of costs in conducting and defending suits for defendant; and it was objected, that plaintiffs cannot recover for counsel fees charged against the defendant. The learned judge at the trial, reserved for the consideration of the court, whether the charges for counsel fees should not be deducted from the verdict. A rule nisi was obtained in Hilary Term last, for entering the verdict absolutely for the full amount; and cause was shewn against this rule last term. It was sworn (and not denied) that in the bills, upon which the balance for which the verdict was given was due, counsel's fees to the amount of 28*l.* 10*s.* have been charged; of which sum, 14*l.* 10*s.* have been taxed to defendant, on judgments obtained in his favour against other parties, of which 9*l.* 10*s.* has been actually paid (to plaintiff) in full payment of that sum; and that 14*l.* was for counsel's fees, not taxed to defendant.

Wilson, counsel for plaintiffs.

Duggan, counsel for defendant.

ROBINSON, C. J.—So far as regards counsel's fees paid to other counsel by the plaintiffs, as attorneys for this defendant, of course plaintiffs can recover for them: and as to any counsel's fees taxed for plaintiffs, as defendant's counsel, against the opposite party, in cases in which the defendant succeeded, which counsel's fees, with the other taxed costs, have

passed into defendant's hands, of course the plaintiffs can recover the amount of such fees, as money held by the defendant to their use. Then as to any counsel's fees charged for by plaintiffs as due to them for business done in suits in which they were his attorneys and counsel, I am of opinion, that when any such fees have been taxed to plaintiffs, that is not as fees disbursed to other counsel, but as fees to be paid to themselves, by the defendant as their client, according to the table of fees established under the statute 2 Geo. 4, ch. 2, sec. 45, they may sustain an action to recover the amount. The statute expressly enacts that this court "shall by rules or orders, to be from time to time made, ascertain, determine, declare and adjudge, all and singular the fees which shall and may be taken, or be allowed to be taken, by any clerk of the crown, *counsel*, attorney, sheriff, officer or other person, for or in respect of any business to be done in the Court of King's Bench, as well in civil causes as in criminal proceedings," &c. It is a general principle, "that where an act of Parliament casts upon a party an obligation to pay a specific sum of money to particular persons, the law enables those persons to maintain an action for it. *Tilson v. Warwick Gas Light Company* (a), in which case it is noted by one of the learned judges as an illustration of the principle, that under the statute 28 Eliz. ch. 4, which says that the sheriff shall take for his fees no more than twelve pence for every 20*l.* under 100*l.*, and six pence for every 20*l.* above 100*l.*, the sheriff may maintain debt for those fees, though it is otherwise clear, that the sheriff, as a public officer, could have brought no action to recover for services rendered, &c., and though the enactment referred to is only in negative terms "that he shall take no more," &c. Except where the fee is one claimed under this provision, the principle of law will apply, which denies to counsel and physicians the right to sue for their professional services,—a principle which it is thought, in England, for the advantage as well as for the honour of the profession, should be maintained in force; and for reasons which apply here equally as in England.

SPRAGUE AND WIFE *v.* NICKERSON.

Unless a specific contract of hiring be proved, the court will discountenance the bringing of an action by a son or daughter, against the parent, for services performed while living in the parent's house.

Assumpsit on common counts, for work and labour—general issue and statute of limitations.

Replication, that cause of action did accrue within six years. Verdict for plaintiff, £75. New trial moved on the law and evidence, and for excessive damages.

Eccles, counsel for plaintiff.

Burns, counsel for defendant.

ROBINSON, C. J.—It seems by affidavit filed, that the defendant had determined to arrange this suit: and did not therefore, wish the rule to be passed. As it has become necessary, however, to decide upon it, I am of opinion there should be a new trial upon payment of costs. It is, in my opinion, of very dangerous tendency that, after the father of a family

has died, his children, and more especially his daughters, who have lived with him as members of his family, should be encouraged to bring actions against the estate, upon a claim for services rendered to their parent. Where there is an express contract between a father and his daughter, that the latter living with him, and being above twenty-one years of age, shall serve him on wages, as any other hired person would do, of course there can be no reason why effect should not be given to the contract. But here is an unmarried female, living for years in the house with her father, because he is old and infirm; she brings, after his death, an action for several years' wages, not shewing that any specific contract of hiring had taken place, but founding her claim on some loose expressions, heard in casual conversation, that he meant to make her compensation. The evidence was not clear—the amount allowed was exorbitant, I think. This young woman could not be living any where else more properly than with her aged and infirm parent; and if she did acts of service, instead of living idly, it is no more than she ought to have done in return for her clothes and board, to say nothing of the claims of natural affection which usually lead children to render such service. If, upon the kind of evidence that was given here, such verdicts should be given and upheld, creditors would stand a good chance, in many cases, of having the assets of an estate materially diminished, if not consumed, by claims of this nature, set up by some one or more members of a family, and supported by the testimony of others, as to what the father declared he would do in his will.

Rule absolute.

KIRBY v. LEWIS ET AL.

The court will grant repeated new trials where verdicts are rendered contrary to law and evidence, especially in cases affecting continuing rights.

Case for disturbance of right of ferry. General issue pleaded. Verdict for defendant. Plaintiff moved for a new trial, without costs, the verdict being contrary to law and evidence and the judge's charge.

Draper, counsel for plaintiff.

Blake, counsel for defendants.

ROBINSON, C. J.—On a former occasion, (Michaelmas Term, 1842), when this same case was before us upon a motion for new trial, when a verdict had been rendered, as on the last trial, for the defendants, the court fully explained the grounds on which they felt themselves compelled to interpose. And though there have since that time been verdicts rendered for the defendant upon other trials of the same cause, which the court have felt themselves compelled to relieve against, we ought not to depart from ground so deliberately taken; and no one who reflects upon the necessity of maintaining the rights of property, by the due application of certain principles of law, can desire that we should. If the verdict which has on this last occasion been rendered for the defendant, be as clearly against evidence as the others were considered to be, no one, it must be assumed, could desire to see them upheld, except indeed those who are charged in the action with an unwarrantable infringement of the plaintiff's right, and those who in the course of their professional exertions in their behalf have naturally strengthened themselves in the persuasion, that upon some legal, or at least equitable ground, the evident inclination

of successive juries in favour of the defendants may be found capable of being supported. We have pleasure however in saying, that the professional duty of urging again upon the court every argument which the case admitted of against any interference with this verdict, could not have been discharged in a manner less calculated to prejudice or obstruct the due administration of justice. If in the last investigation of the facts of this case before a jury, when the whole merits were very deliberately and carefully gone into, and were presented to the jury in a most clear and impartial manner by the learned judge who presided at the trial, we could find that the right on the one side, or the fact of the supposed infringement of that right on the other, had been placed on essentially new ground, so that we could conscientiously affirm that the points contested were not the same, it would relieve us from a duty by no means agreeable, to be able to say that this verdict might properly stand, and that the plaintiff must content himself with the final denial of a remedy for his supposed right. Unless we can affirm this, we should do wrong in affecting to recognize a substantial difference, where none exists; the only consideration that we could properly entertain would be, whether, in a case of this description in which we thought the right to be clear, we should nevertheless suffer a verdict plainly against that right to prevail, rather than interpose again, after having relieved against the successive verdicts of so many juries. The plaintiff declares upon a right of ferry, calling it a common and ancient ferry, which he avers, "he is lawfully possessed of as lessee of the crown," and in his declaration he describes it thus: "called the Ferry at Fort Erie rapids, across the river Niagara, and from a certain place called Fort Erie, in the Niagara District, from and to a certian other place called Black Rock." It appeared in evidence, that the crown had by letters patent made several successive leases of a ferry over that portion of the Niagara river between this province and the United States. In 1826, a lease for seven years was granted to John Warren, Esquire, at 75*l.* a year, of "the ferry called the Fort Erie Ferry, over the river Niagara in the said District of Niagara." When this expired, (in March, 1833), the crown by letters patent granted to Charlotte Warren, the widow of the late John Warren, at a rent of 75*l.*, a right of ferry, called in the patent, "our ferry from Waterloo, in the township of Bertie, to Black Rock, in the State of New York." And, on the expiration of this lease, (in 1840), a patent issued to this plaintiff, demising to him for seven years, at a rent of 50*l.*, a right of ferry, called in the patent "our ferry across the river Niagara, and between Fort Erie, in the District of Niagara aforesaid, and Black Rock, in the United States of America, and commonly known as the ferry at Fort Erie Rapids." It was proved further, that the ferry, many years ago, was kept at a place between Waterloo and that which the plaintiff had adopted in acting under his patent, and that at a subsequent period, it had been kept at the village of Waterloo, a place lower down the stream, and further from Fort Erie; this was I apprehend during the existence of Mrs. Warren's grant, though the evidence does not explain it. I infer it, because in the patent the ferry is so described as to be consistent with that supposition. When the plaintiff in this cause obtained his patent, he wrote to the person who had been ferrying under the last patent, that having obtained a lease of the ferry at Fort Erie Rapids, "it was his intention to remove the landing-

place of the ferry higher up, i. e., about midway between Fort Erie and plaintiff's mill, so soon as practicable, and ultimately, still higher up; having in view the public convenience attending the embarkation from this shore." It is plain, from the acts of the Government, from this letter of plaintiff's, and from the evidence in the cause, that the ferry was familiarly known as the Fort Erie ferry, or the ferry at Fort Erie Rapids, because it passed over the rapids called Fort Erie Rapids from the name of the fort in their vicinity. It was not shewn, or pretended, that there had been at any time a ferry crossing literally from Fort Erie, that is, from the site of the fort, or that there had been at any time more than one public authorised ferry over this part of the Niagara river. It had started from different points on our side of the water, the furthest point from Fort Erie being that at the village of Waterloo; but even while the ferry-boat departed from thence, it was the sole existing ferry from Canada to Black Rock, over the Fort Erie Rapids. The change which the plaintiff made in taking a point of departure nearer Fort Erie, brought the ferry more clearly within the terms of the description in his patent than it would have been if he had continued or adopted any place of departure lower down. And there is not the least room for question, that for a long series of years, under the several designations used in the succession of patents which had issued, there had been kept up one public ferry, and but one, across the Niagara river, over the Fort Erie Rapids, between the Canadian shore in the vicinity of Fort Erie, and Black Rock, traversing the rapids at the same point, and passing up on our side as near to Fort Erie as it was possible or convenient to go, and striking over from thence to Black Rock. Upon this traverse the plaintiff's ferry boat was publicly employed, under his patent issued in 1840, for which he paid a rent to the crown; and upon this traverse the defendants, while he was so employed, without any public license or authority whatsoever, set up a ferry in disregard of his right, setting out, it is true, from a point about half a mile lower down, but going, as the course of the navigation compelled them to do, along the Canadian shore till they passed the very point which his ferry departed from, even taking, on one occasion, a passenger from his wharf, and then traversing the rapids and the river to Black Rock, precisely over the track of the plaintiff's ferry. The first question raised was, whether the plaintiff's patent supported such a right of ferry as he had declared upon. We have discussed this question on former occasions, and need not enter again into it further than to say, that when the crown granted this ferry to the plaintiff, referring to it as a well known ferry commonly "*known as the ferry at Fort Erie Rapids,*" they granted a right which must have been well understood by the public to continue the ferry which a succession of patents had authorised, and which had hitherto been undisturbed, though the places of departure had not always been the same, and though a part of the description was not strictly accurate. There never had been in fact a ferry between Fort Erie and Black Rock, though there had been, for forty or fifty years perhaps, a ferry over the Fort Erie rapids. I consider that the words between Fort Erie and Black Rock are to be reasonably construed so as to make them consistent with the other part of the description. The ferry by which people had always passed "between Fort Erie and the country contiguous to it and Black Rock, was the ferry commonly known as the ferry over Fort Erie

rapids and no other," though the landing place was not at the Fort. A large tract of country often receives in common parlance a name from some one remarkable object near it, though such object itself covers but a small space: thus we speak of the Falls of Niagara, when we mean the country around them, and of the ferry below them as the Falls ferry, when it is very certain that there never could be a ferry over the very Falls themselves. Many other instances might be cited. When the letters patent speak of "our ferry commonly known as the ferry at Fort Erie Rapids," they speak of something familiarly known, something that had a previous existence. But as often as this cause has been tried, it has never been attempted or pretended to be shewn, that there was at any time on the Niagara river, within many miles of Fort Erie, any other ferry to which it could have been intended to allude, than the one public ferry which for forty or fifty years had been kept up by public grant from the crown, from time to time,—no more than one such ferry ever existing at a time; and the seven years' term in that ferry having, as these defendants knew, just expired before the plaintiff's patent was issued, and being renewed in favour of the plaintiff for a further seven years with an intention that could not be mistaken. The circumstance too that all these ferries are subject to be regulated, and were in fact regulated, by act of Parliament, serves further to identify and fix the right in question. It is but natural that the whole military reserve attached to the fort should be called "Fort Erie," and from the map in evidence on the trial it will be seen, that the plaintiff's ferry landing was on the lot next to this reservation, and we find him, in his correspondence, calling his place of residence "Fort Erie," as I have no doubt it would in general be called by persons writing from thence. Then the next point raised was, that at all events whatever right the patent conveyed, the declaration did not support a right such as can be said to be consistent with it. But it seems to us very clear that it does. The same considerations apply to the language of the declaration as of the patent. They agree in terms, and both must be construed so as to reconcile, if possible, the several parts of the description, and with due regard to public and notorious facts. The defendants then upon this last occasion, relied more strenuously on a defence which had been intimated on former trials, though not brought so prominently forward, and not attempted to be supported by such particular proof. I mean the alleged difficulty of the plaintiff's landing his passengers at Black Rock. I see nothing in the evidence given on this point, that enables us to say that the plaintiff had no right of ferry granted by his patent, which all the world are not at liberty at their pleasure to infringe; and unless it goes that length, it does not furnish a defence. A Mr. Haggart, it was proved, enjoys a right of ferry under the Government of the State of New York, from Black Rock to this side of the river, under an act of their legislature, containing provisions which it might be well to imitate in granting similar rights in this province, that is to say, restricting the right to a certain space along the shore, and imposing a specific penalty, of fifty shillings a day, on any person who shall ferry in defiance of that right. It was shewn on the trial, that this Mr. Haggart holding this right, has leased also a portion of the pier forming the harbour of Black Rock; and has by this means the control of a bridge across the Erie Canal which runs by the side of the

pier. This enables him, it seems, to impose a charge upon persons crossing the bridge in order to reach the village of Black Rock; and he has shewn a disposition to exercise this controul over the bridge in such a manner as to throw obstacles in the way of passengers coming over by the plaintiff's ferry. Hence it is argued the plaintiff has not a right to land his passengers at Black Rock, and so cannot fulfil the condition of his patent, wherefore his exclusive right falls to the ground. Now this involves rather a momentous public question. It is not pretended that in time of peace, as this is, there is any difficulty of a public nature in the way of Her Majesty's subjects from Canada landing at Black Rock, which is a large village, and enjoying all the privileges of a friendly intercourse with the subjects of a foreign country as well as at any other point in the long frontier which separates us from the United States. It is not pretended that there is no other access to the village of Black Rock but that which leads over Mr. Haggart's bridge, on the contrary, it was proved upon the trial, that there were other approaches; neither did it appear on any former trial, or on this, that the plaintiff, while he was allowed to exercise undisturbed the right which his patent gives to him, had found any difficulty in landing his passengers. And supposing it were otherwise, and that Mr. Haggart had really that controul over the only access to Black Rock, which enabled him to throw inconveniences or expense on the way of all who passed from Canada into that village, we must, in justice to the people of Canada, pause before we admitted that to be a conclusive reason in law for holding the plaintiff's right of ferry destroyed. It might be very convenient for Mr. Haggart to endeavour by such means to secure to himself, as the proprietor of the ferry on the American side, a monopoly of the transport of passengers between the two countries; and he may also choose for some reasons to favour the interests of persons on our side of the water, in opposition to those claiming under our government a right of ferry, for which they pay a valuable consideration, and in the exercise of which they are subject to a salutary controul and responsibility which intruders are free from. But we do not hold the law of this province to be such as will assist him in this object. If Black Rock were not accessible to the people of this country crossing the river Niagara, then of course there could be no ferry to it. If the truth had been, that within the period, when the plaintiff's franchise was unlawfully interfered with, he had it not in his power to land his passengers at Black Rock, that would have been an answer to the action; but his placing a charge or toll upon a bridge forming even the only passage to the village, much less upon a bridge forming only one of the approaches, can never be allowed to have the effect of disabling our government from granting a ferry over that part of the river. We must presume that whatever is done of that kind on the American territory, is done according to their laws, and the people of Canada must submit to legal tolls in passing into a foreign country. If they find it more convenient to go on those terms than not to go, they should have the option; and I see no reason in what was alleged on this head, why we must submit to have the whole transit between Canada and Black Rock placed under the regulation of foreign ferries, or conducted by persons in our own country acting in opposition to the constituted authorities. Another point has been insisted on, which is not new, but appeared on a former trial, namely, that since the

defendants have taken upon themselves on that authority the right to ferry, another person, with the privity of plaintiff, has, during part of the time, run a boat from a point between the defendants' landing and the plaintiff's. We do not see how that can affect the plaintiff's legal right to recover for the infringement of his right which was previous to any fact of this kind. It probably did prejudice to the plaintiff's case in the view of the jury, as it seemed to shew an inconsistency in the plaintiff's conduct, or a distrust in the validity of his pretensions ; but it is not difficult to understand the grounds on which the plaintiff acted in this respect ; and, at any rate, it is matter wholly foreign to the question of his right having been actually injured by the defendants. On the whole, we think this a plain case, in which these defendants, well knowing that the ferry between this shore and Black Rock, over the Fort Erie rapids, had been always maintained under a patent from time to time granted, which patent had expired ; and well knowing also, that the plaintiff had obtained a grant of the ferry for a new term, determined to ferry in defiance of his right. It is a disingenuous pretence in them to give as an excuse, that the plaintiff did not set out from the point formerly taken, for that had not been uniform, as they well knew, and the change he had made, in reality brought the ferry more literally within the terms of his grant than if he had taken a landing lower down. It is plainly also unreasonable, in our opinion, to affect to look upon it as a doubtful point of fact, whether defendants interfered with the plaintiff's right when they passed over the very same track ; and the only difference is, that they set out from a place a little below, intending to pass, and actually passing by the very landing from whence the plaintiff's public ferry-boat departed, and crossing from thence over the very water across which the crown had granted him the exclusive right of ferrying, and taking thence passengers to the very limits of his ferry on the opposite side. No doubt whatever these things were done ; and whether they are an injury to the plaintiff's right, are facts to be found by the jury, in the same sense as all facts are to be found by them : but about the facts here there is no dispute, and it is necessary to the ends of justice that the conclusion should be consistent with them. The plaintiff is here seeking, by the only legal means, a protection for continuing right ; the defendants do not deny the acts charged upon them. The plaintiff has offered to desist from prosecuting his action further, if the defendants will abandon their wrongful interference with his ferry ; this they decline, and continue to act in defiance of his right ; and we think we should be denying that remedy which the plaintiff can justly claim at our hands, if we did not make this rule absolute.

Rule absolute.

LEWIS v. GRANT.

Semble—that a bond to the limits is not broken where the debtor has not wilfully withdrawn from the limits, but has been misled as to their extent, and gone beyond them without any idea that he was transgressing.

This was an action of debt brought by the plaintiff, as the assignee of the sheriff of the Western District, on a bond conditioned that the prisoner, John Cowan, should not depart from the limits to the gaol of the said district. The cause was tried at the fall assizes, in 1841, for the

Western District, before the Hon. Mr. Justice Jones, when a verdict was found for the plaintiff, subject to the opinion of the court upon the following case:—That the post-office is in a building fronting on Peter Street, which is in the town of Sandwich; that *that* and other lots on the same side of Peter Street have been assessed as town lots, and paid taxes for town improvements, being valued at twenty-five pounds each, as the other town lots in Sandwich are valued by statute; that there is a block of town lots on the same side of Peter Street, well known as such; that the plans of the town of Sandwich include the park lots as well as the town lots; that the surveyor-general's schedule, furnished by him of patented and unpatented lots, for the purpose of shewing what was liable to be taxed in the Western District, describes the park-lots under the head of town-lots in Sandwich; that the clerk of the peace of the Western District and his deputy, who also acts as treasurer and is deputy treasurer, instructed the assessor, Fabrem Parent, to assess those lots as town lots since the sub-division; that the collector collected the town-lots taxes on those subdivisions of a park lot, on one of which the post-office stands; that the lot on which the post-office stands and is situated, was conveyed by Charles Baby, Esq., to one Aulin as a town lot; that Aulin conveyed it to Edward Holland, Esq., post-master, as a town lot; that the only breach of the limits committed by the prisoner, John Cowan, was going to the post-office of or belonging to the town of Sandwich, on that park lot, and on that subdivision of a park-lot; that there is no statute fixing the limits of the town of Sandwich; that the original patent for the whole park lot on which the post-office stands, described the park lot as being in the township of Sandwich; that the said park lot has been assessed by Charles Baby, Esq., as a township lot.

Boulton, Q. C., counsel for plaintiff.

S. B. Harrison, counsel for defendant.

ROBINSON, C. J.—I am of opinion, that on the case stated the plaintiff is not entitled to recover. It is admitted that Peter Street is in the town of Sandwich, that the post-office fronts on Peter Street, and that the only withdrawal from the limits alleged was the debtor's going *to* (not *into*) the post-office. *To* the post-office, does not include the post-office, that is, does not necessarily include it *ex vi termini*, though in some cases it may be so construed, according to circumstances and the reason of the thing. The office may have fronted on the street, leaving no space between, and then the debtor may have gone to the post-office without leaving the street, and if so, without leaving the town: in point of fact, persons do not always leave the street when they go to the post-office; in many offices letters are delivered through an opening or window to persons in the street. In an action for the escape of a debtor from the limits, a withdrawal must be clearly alleged. Upon the facts of this case, if the debtor had been stated to have gone into the office, I incline at present to think the bond would not have been broken; I think that the condition means, that the bond is broken if he wilfully withdraws; *prima facie*, he does wilfully withdraw if he goes out of the legal limits, but where it is shewn that he was misled in a doubtful case, and had no idea that he had transgressed, there I should doubt; however, my judgment proceeds on the first ground.

MCLEAN, J., and HAGEMAN, J., concurred.

Judgment for defendant.

SHUTER *v.* DEE.

If there be two indorsers on a promissory note under 100*l.*, and the holder of the note brings separate actions against them, he will, under 5 Will. IV., ch. 1, be entitled to tax his full costs in only one suit, and will be allowed no more than disbursements in the other.

The plaintiff is the holder of two promissory notes, together under 100*l.*, made by Doyle, and indorsed by Lane and the defendant, as first and second indorsers. The plaintiff first sued Lane separately, who, after issue joined, gave a cognovit; and having also sued the defendant in a separate action, he likewise obtained a cognovit from him. In May, the plaintiff received from Lane payment of the debt and costs in full in the action against him, and was at the same time offered the disbursements in the suit against the defendant, which he refused to receive. The defendant resides at Niagara, and Lane at Youngstown, in the state of New York, but he is almost daily at Niagara, where he was served with process in February. As the plaintiff insisted upon receiving full costs from the defendant, an application was made to the Chief Justice in Chambers to restrict his costs to the actual disbursements under 5 Will. IV., ch. 1, and an order was made by the Chief Justice to that effect: the plaintiff moved this term to rescind this order, and after hearing—

Eccles, counsel for plaintiff, and

Burns, counsel for defendant,

and reading affidavits filed by the plaintiff, shewing that when the defendant was served with process, Lane was not in the province.

ROBINSON, C. J., gave judgment. We are of opinion, that as the act does extend to the several indorsers of a bill, it does also in spirit extend to indorsers of a note; it is a remedial statute for preventing costs being unnecessarily incurred, and operates not by depriving any one of an advantage, but as a warning not to incur charges that will not be paid. It should be liberally construed. The plaintiff should therefore have included all in his process, if he wished to secure his costs, and if he could not serve one of the defendants as he alleges, he might then have sued him afterwards separately, and proceeded under the 13th section of the statute.

MCLEAN, J., and HAGEMAN, J., concurred.

Rule discharged.

ASKIN *v.* LONDON DISTRICT COUNCIL.

A clerk of the peace cannot charge fees for any service for the remuneration of which no provision is made by statute or otherwise, and the payment of such fees by a district council in accounts rendered for services in former years, will not prevent their afterwards disputing the charges in the accounts of subsequent years. If a clerk of the peace accept a salary in lieu of all fees, he is not afterwards entitled to any remuneration except such salary, and an action will not lie against the district council for fees charged for services performed by a clerk of the peace.

The plaintiff is clerk of the peace of the District of London, and brings this action of indebitatus assumpsit against the district council—a municipal corporation, created by our statute 4 & 5 Victoria, ch. 10, setting forth in his declaration that he was clerk of the peace of the District of London, and as such had done certain work for the defendants,

at their request, to the value of 27*l.* 10*s.*; that such work having been done by him, he had submitted the account thereof to W. S. and D. H., duly appointed to audit the accounts of the said district; and that they did examine and audit the account, and did allow the plaintiff the said sum of 27*l.* 10*s.* for the said work, of which defendants had notice, whereby an action hath accrued, &c. Defendants plead, 1st—that they were never indebted in manner aforesaid, &c.; 2nd—that the auditors did not examine and settle, or audit the account, &c.; 3rd—that the auditors did not allow to the plaintiff the said sum of 27*l.* 10*s.* or any part thereof, &c. Plaintiff joins issue on all these pleas. In his bill of particulars, plaintiff claims for the following particulars: first—

For making calculations on sixteen collection rolls for the assessment of one-third of a penny in the pound valuation on each inhabitant, at 15 <i>s.</i> each roll	12 0 0
For making calculations on fifteen collection rolls for the assessment of four-fifths of a penny per acre on wild lands, as returned by assessors of townships, on each inhabitant, at 20 <i>s.</i>	15 0 0
To making up statement of such rates and assess- ments for the treasurer of the London District	0 10 0
	<hr/>
	£27 10 0

It was proved on the trial, that upon a report of the committee of the justices of the peace for the district, recommending that a salary of 300*l.* be allowed to the clerk of the peace in lieu of all fees allowed by order of sessions, and which are charged in his annual accounts, the justices did, on the 10th July, 1841, make the following order in general quarter sessions:—"Whereas it is considered expedient that the sum of 300*l.* currency be paid annually to the clerk of the peace, in quarterly pay-
ments, in lieu of all fees allowed that officer, and hitherto charged in his annual account against the district. That the said salary shall commence from the April sessions last." It was proved further, that the district auditors, having the account in question before them, had marked it audited and approved, subject to the passing of a bye-law for the last items of the account, for which charges they declared there was not yet any proper authority. The other item of 12*l.* they seem to have passed, with the remark, however, that it should be charged against the gaol-fund exclusively. It was admitted by the parties, in a case agreed upon at the trial, that the item of 12*l.* was allowed to the plaintiff under a schedule of fees established by the justices in quarter sessions in the year 1838; and further, that the items charged, and at the rate at which they are charged in this account, have been allowed to the plaintiff, and that they have been allowed since the order in sessions, in 1841, limiting his income to £300. A verdict was taken for the plaintiff for 27*l.* 10*s.* subject to the opinion of the court upon the following questions: 1st—"Whether the plaintiff is entitled, as a matter of law, to remuneration for his services claimed, there being no provision made for him in respect thereof? 2nd—Whether the order of the district sessions, fixing his salary at 300*l.* in lieu of all fees, precludes him from receiving

recompence for these services? 3rd—Whether the payment of the justices, before the District Council Act was passed, and by the district council since the act, of similar charges for the same services in former years, and since the order was made fixing the salary, is binding upon the district council, and gives to the plaintiff a legal right to recover for such charges in this action?

Cameron, J. H., counsel for plaintiff.

Wilson, A., counsel for defendant.

ROBINSON, C. J.—Upon the first of these questions, we are of opinion that the plaintiff is not legally entitled to a remuneration for the services in question, as he has not shewn a specific authority for each specific charge, or for any of them. The clerk of the peace is an officer serving the crown, and appointed to discharge public duties, which most of them concern the administration of justice; though there are other duties imposed upon him by act of parliament, or under authority of acts of parliament; and with respect to all his official services, we are of opinion that he cannot be held entitled to any other recompense than has been expressly assigned to him by law. It is a general principle, that every fee to a public officer must have a legal origin. A court and jury have no authority to tax the public revenue by awarding an allowance as upon a quantum meruit. Upon the 2nd question, we are not aware under what authority the justices in quarter sessions may have supposed that they had a right to order a fixed salary to the clerk of the peace, in lieu of fees to which he was entitled by law. They could undoubtedly make such an agreement with his assent—so far, at least, that he could not complain of it as an injury; but whether he assented to it or not, if it be true as we gather from the case stated, that the plaintiff has received the salary of 300*l.*, given in the terms in which it was ordered, we are of opinion that he could not make charges against the district for such services as the services he rendered within the period for which he has received the salary, for he would by that means be doubly remunerated for the same service. Upon the third point, we are of opinion, that the district council are not bound by former payments, whether made by themselves or by the justices, since they are not bound to pay any fee to the clerk of the peace for public services rendered by him in his office, and not under their order, except where his claim to such fee is established by a positive law. The 1st, 43rd, and 44th clauses of the 4 & 5 Vic., c. 10, seem to be the only provisions in the District Council Act bearing on this case. The first clause merely gives to these corporate bodies capacity to sue, and makes them subject to be sued, which latter means of course nothing more than that they may be sued for such demands as they are liable to answer, either upon their contract or upon the general principles of law. There is nothing, in our opinion, in the 43rd and 44th clauses inconsistent with what we now hold. The first of them refers evidently to contracts made by or with the district, and the latter only assures to the clerk of the peace and other officers the same charges for services which by the act are found under the controul of the council, as had before been granted to him (that is, by law) until the council should order otherwise. The case submitted to us does not in terms refer to the general and most important question of any, namely—whether an action will lie for the clerk of the peace against the

district council upon a demand of this description, that is whether such a remedy is open to him at all. But the learned counsel, in the argument, discussed the point, and we take it for granted, that our judgment is expected upon it. It is our opinion then, independently of all peculiar features in this case arising from the order of sessions, and from previous payments, that the clerk of the peace cannot maintain this action, first, because he has shewn no legal right to the recompence he claims. It is an express provision of the statute of Westminster (3 Ed. 1 ch. 26), that no sheriff or other the king's officer take any reward to do his office, but shall be paid of that which they take of the king; and he that so doth, shall yield twice as much, and shall be punished at the king's pleasure. Lord Coke, in his commentary on the statute (2 Inst.), says, that under the words "other king's officer," are classed escheators, coroners, bailiffs, gaolers, the king's clerk of the market, and other inferior ministers and officers of the king, whose offices in any way concern the administration or execution of justice, or the common good of the subject, or the king's service, and that they can none of them take any reward for any matter touching their offices but of the king. The true meaning of this of course is, that unless when an act of parliament gives them a right to look for a recompence in any other quarter, they can take nothing for any service rendered by them in their office, except of the king. And this statute is said to be made in affirmation of a fundamental maxim of the common law,—quod non faciant vicecomites vel alii ministri regis premium mercedem vel aliquid pro officio suo faciendo, sed tantum de foedis suis a domino rege sint contenti. And Lord Coke makes upon this subject this pointed remark, "It is a certain and true observation, that the alteration of any of those maxims of the common law is most dangerous, whereof you shall elsewhere read some instances, whereunto you may add this ancient maxim affirmed by an act of parliament, for whilst sheriffs and other ministers of the king, whose offices any way did concern the execution of justice, or the good of the common weal, could take no fee at all for doing their office but of the king, then had they no colour to exact anything of the subject, who knew that they ought to take nothing of them. But when some acts of parliament, changing the rule of the common law, gave to the said ministers of the king fees in some particular cases to be taken of the subject, whereas, before, without any taking at all their office was done, now, no office at all was done without taking. But at this day (Lord Coke adds), they can take no more for doing their office, than have been since this act allowed to them by authority of parliament." These duties of the clerk of the peace, in preparing assessment rolls, or making calculations upon them, are duties discharged in obedience to the acts of parliament, or in consequence of their providing what makes it his duty. And it is a general rule, that when a duty is cast upon any one by act of parliament, and no remuneration is provided for the doing it, the party is to perform the duty without remuneration. *Graham et al. v. Grill* (2 M. & Sel. 295), in which case also the court determined that the sheriff's claim to poundage is not in the nature of a claim for work and labour, and that when it is not expressly conferred by act of parliament, he can not claim it. (Com. Digest, Extortion E.) (Officer G. 15.) Then secondly, in addition to the objection that the clerk of the peace, as a public officer, can be entitled to no fee which is not given to him by law,

he cannot recover these fees in this action, because the District Council are not liable to be sued by him for any such public service, as for work and labour at their request. The modern case of *Jones v. The Corporation of Carmarthen*, stated in the argument (8 M. & W. 605), is an express decision on that point meeting this case, and much resembling it in its particular circumstances. The services were public services as these are, rendered all in obedience to the law, by a public officer who, among other duties, had to discharge within a borough, which is a county of itself, the duties of clerk of the peace ; and the officer had in that case as in this case to be paid on several occasions by the corporation the same fees for similar services. But when they refused to pay, and the officer was put to his legal right and to his remedy, whatever it might be, the court were clear that no action would lie, for there was no contract between the parties: the officer was not serving them, he was employed by the king, and by the law which required the services to be done ; the reasons given by the court in that instance apply with increased force here, because there the officer was appointed by the corporation—here by the crown. There are many reasons against entertaining such an action, but it is unnecessary to go into them, the point being so clear. There is a case of *Fleetwood v. Finch*, 2 H. B., bearing upon the main question raised here ; it does not touch the question whether an action could lie against these defendants, because there it was the treasurer of the county who was sued by the clerk of assize for a fee claimed to be payable by law out of the county revenues. It was an amicable action, in which it was admitted, that the treasurer had money in his hands more than enough to pay these demands ; the justices had ordered him to pay it, and he would be very willing to pay it if the plaintiff should be considered entitled to the fee. The court thought that he was entitled to the fee claimed, under a fair construction of an act of parliament, and the learned Justice Eyre says, "I agree that no officer can claim a fee except by ancient usage or act of parliament." It is perhaps not material to be observed, since we are clear against the action being maintainable, that upon the 3rd issue on the record the defendants seemed at any rate entitled to succeed, so far at least as regarded the two last items, if not the whole ; for the plea is that the items were not allowed by the auditors as the declaration alleges, and they certainly were not, otherwise than subject to a contingency which is not shewn to have arisen ; but upon the other grounds, our opinion is, that a verdict be rendered for the defendants.

Judgment for defendants.

RUSSELL ET AL *v.* McDONALD ET AL, EXECUTORS OF McDONELL.

Where plaintiffs declared in special assumpsit, on a promise to pay a lost bill of exchange, against the drawer, but did not state any new consideration for the promise, nor allege that the bill, which was drawn payable to the plaintiff's order, was unendorsed at the time of its loss ; the declaration was held bad, on general demurrer.

Plaintiffs sue in assumpsit in a special count, stating that the testator, Alexander McDonell, on the 12th April, 1828, drew a bill on the Hudson's Bay Company, in London, in favour of the plaintiffs or order, for 300*l.* sterling, at three days' sight, but the bill was lost after it was delivered, and was never presented to the Hudson's Bay Company ; that Alexander

McDonald had negotiated the bill with the plaintiffs, and had received from them the sum for which it was drawn, namely, 300*l.* sterling; that the Hudson's Bay Company had never paid the money, or any part thereof, to the plaintiffs, or to any other person; of all which premises the said Alexander McDonald in his life time had notice. It then avers, that in consideration of the premises, the said Alexander McDonald, on the 1st of Jan., 1840, promised the plaintiffs to pay them the said 300*l.* sterling when he should be thereto requested. Defendants plead several pleas, first, denying the promise; second, denying the making of the bill; third, that if the bill never was presented to the Hudson's Bay Company for acceptance or payment, as in that count mentioned, such want of presentment arose from, and was owing to, the mere carelessness, negligence, omission, and default of the plaintiffs, as the indorsers and holders of the bills, and not otherwise; fourth, denying that the plaintiffs paid the 300*l.* on negotiating the bill. Plaintiffs take issue on the first, second, and fourth pleas, and demur specially to the third, assigning for cause, that it is not denied positively, but only argumentatively, and hypothetically, that the bill was never presented to the directors; and that the plaintiffs are in the plea said to have been the drawers of the bill, whereas the declaration states the said Alexander McDonald to have been the drawer.

Blake, counsel for plaintiffs.

Draper, Q. C., counsel for defendants.

ROBINSON, C. J.—There is no doubt in our opinion that the plea is bad, not on account of the blunder of calling plaintiffs the drawers of the bill, because that is a mere matter of description or addition, wholly insignificant where it occurs, and may be disregarded altogether without injury to the sense or to the effect of the averment, but on account of the first cause assigned. The hypothetical mode of statement used in their plea, neither admitting the assertion that the bill was never presented, nor denying it, has been in many cases held to be inadmissible. It has not indeed been attempted to support the plea, but the defendant objects to the declaration as bad in substance. He contends that in the case of a lost bill, there is no remedy except under the statute 9 & 10 Will. III. c. 19, which entitles the holder to call upon the drawer to make a new bill of the same tenor as the one lost, giving him security to indemnify him against the lost bill in case it should be found; that the promise made without any new consideration to pay the lost bill is a nudum pactum, and cannot be enforced. The case stands for judgment on that point. The bill declared on is described as being a bill payable to the order of plaintiffs; whether the plaintiffs had endorsed it or not is not stated; it stands, therefore, as a bill in its form negotiable, and not shewn to be destroyed, and which therefore the persons liable upon it would not be bound to pay until it is produced. If the declaration shewed that the bill in fact was not endorsed, that might entitle the plaintiffs to recover on the bill without producing it, upon proving its loss. This action, however, is not upon the bill, but upon a new promise to pay the money, which the plaintiffs had advanced; and the question is, whether this fact, coupled with the circumstance of the defendants having received from the plaintiffs the money for the bill, supplies such a consideration as makes the promise binding. It is not necessary to consider here whether the payee could in such a case recover by suing upon the common counts, without producing the bill; nor

whether he could avail himself of the statute 8 & 9 Wm. III. ch. 17, sec. 3, which enables the payee of an *inland bill* that has been lost to call upon the drawer for a new bill of the same tenor, upon giving him security against his being over charged upon the other. The only question here referred to us is, whether a new promise to pay the bill, notwithstanding its loss, is a *nudum pactum*, unless there was a new consideration leading to it. No new consideration is alleged in this count. We are of opinion that the defendants are entitled to judgment upon the demurrer. It is not alleged that the bill is destroyed, but merely that it is lost. It is described to be a negotiable bill, that is, payable to the order of the payee, and it is not averred that it was in such a state when lost, that no person but the plaintiffs can have acquired a right to sue thereon. (a) The case of Davies *v.* Dodds (b), seems to be fully sustained at this day in England, and determines this case, for I can see no ground for drawing a distinction between actions against the acceptor in such cases, and an action against the drawer, as this is. It is true the drawer in this case has received from the plaintiffs the value of this bill, but that only supplied a consideration for the bill; he sold them the bill as he would have sold them any other commodity, and did not promise expressly, or by implication, that he would at any future day pay them the money back again, while the bill was still out against him, not dishonoured by the drawer. The plaintiffs rely upon being able to support an action upon an alleged new promise, and in no other shape could they hope to recover. But the objection that meets them here is, that there is no new consideration for the new promise; and Davies *v.* Dodds (c), and Townsend *v.* Robinson (d), are strong authorities to shew "that the law does not recognize a moral obligation in the defendant to pay the plaintiff, who by his negligence has exposed the defendant to the danger of being compelled to pay the bill when produced in the hands of another holder." In Pierson *v.* Campbell (e), the bill had, as in this case, been discounted for the defendant's accommodation, and the money had come into his hands. But Lord Ellenborough held that that did not alter the case. If the plaintiff could have shewn it to be unindorsed, he might have recovered in another form of action, but that is not the question on this demurrer. It is described in the declaration as a negotiable bill, and the plaintiff does not aver that it was unindorsed; the defendant therefore has no security that it is not at this moment in the hands of some bona fide holder for value. And it has been determined that the circumstance of the bill being payable more than six years ago, will not entitle the plaintiff to recover on the ground that the statute of limitations would bar an action by any other holder. The doctrine with regard to the sufficiency of moral obligation to support an express promise is thought by several writers to have undergone a change since the time of Lord Mansfield, while others have denied this, and have contended that the principles which he announced on this head have rather been misunderstood or misapplied. In Wurnall *v.* Adney (f), Eastwood *v.* Kenyon (g), and Roscoe *v.* Thomas (h), this question is considered, and the general doctrine discussed; but it is unnecessary to say more

(a) Bayley on Bills, 288. (c) 4 Taunt. 602. (e) 2 Campbell, 211.
 (b) 4 Taunton, 602. (d) 7 B. & C. 90. (f) 3 B. & P. 249, n.
 (g) 11 Ad. & Ell. 438. (h) 2 Q. B. 237.

than that this particular question, of a promise without a new consideration to pay a lost bill, is settled by express decisions against the action, from which we are not at liberty to depart.

MCLEAN, J., and HAGEMAN, J., concurred.

Judgment for defendant.

DOE LEONARD v. MYERS.

Where a defendant in ejectment, relying upon some supposed irregularity in the plaintiff's proceedings, did not appear at the trial, and the plaintiff was non-suited for want of confession of lease, entry and ouster by the defendant, and the point of alleged irregularity was afterwards decided against the defendant, the court refused to set aside the non-suit and let him in to a trial on payment of costs, although he swore to merits.

Ejectment. At the trial, the plaintiff was non-suited, no one appearing to confess lease, entry and ouster for the defendant. The defendant this term moves to set aside the non-suit, and for a new trial on payment of costs, filing affidavits shewing that he conceived that there was an irregularity in the plaintiff's proceedings; and that, in consequence thereof, he did not appear, but that the point of irregularity was afterwards decided against him in the Practice Court; and affirming that he had a good defence upon the merits.

ROBINSON, C. J.—We think we cannot properly do what the defendant desires. He chose to rely upon a supposed irregularity, and laid by, instead of shewing his right to the possession of the premises: he has failed in his objection, and must therefore take the consequences; for it would be unfair to allow him, after making this experiment, to defend himself upon the merits, which he had waived, for the sake of throwing impediments in the way of the plaintiff, especially as it is in his power, if he really has a defence, to become plaintiff in his turn in another action.

Rule discharged.

TYRILL v. ANNIS.

A. being indebted to B., and C. being indebted to A., B. and C., without the assent or knowledge of A., agree that C. shall pay B. the debt due to him by A., on condition that B. shall discharge A. from the debt owing by A. to B. Held, that such agreement is binding on C., and that B. may maintain special assumpsit against him for its non-performance.

Special assumpsit. The plaintiff declares that one Luther Smith was indebted to the plaintiff in a large sum of money, to wit, the sum of £92 of lawful money of the Province of Canada, for work and labour before that time done and performed by the plaintiff, for and at the request of the said Luther Smith. And whereas the defendant was indebted to the said Luther Smith in a like sum of money, to wit, the sum of £92 of lawful money aforesaid, in consideration that the plaintiff would discharge the said Luther Smith from the said debt so due and owing by him to the plaintiff as aforesaid, the defendant promised to pay to the plaintiff the said sum of £92 so due by him to the said Luther Smith as aforesaid. And the plaintiff saith, that afterwards, to wit, on the day and year aforesaid, the plaintiff discharged the said Luther Smith of and from all liability of and from the said debt so due by the said Luther Smith to the plaintiff; and the same thereby became and was

wholly extinguished, of which the defendant had notice. Yet the defendant hath not paid the said sum of £92, or any part thereof, to the plaintiff, although often requested. Second Count.—And whereas also the said Luther Smith was indebted to the plaintiff in a large sum of money, to wit, the sum of £56 5*s.*, for other the work and labour before that time done and performed by the plaintiff, for and at the like request of the said Luther Smith. And whereas the defendant was indebted to the said Luther Smith in the like sum of £56 5*s.*: in consideration that the plaintiff would discharge the said Luther Smith from the last-mentioned debt so due as aforesaid, the defendant promised the plaintiff to deliver to the plaintiff certain other goods and chattels, to wit, one horse and one mare, one waggon and harness, of great value, to wit, of the value of £56 5*s.*, when he (the defendant) should be thereunto afterwards requested. And the plaintiff saith, that afterwards, to wit, on the day and year last aforesaid, the plaintiff discharged the said Luther Smith of and from all liability for and on account of the debt so due by him to the plaintiff, as in this count mentioned; and the same then became wholly extinguished, of which the defendant had notice. Yet the defendant, not regarding his last-mentioned promise, hath not at any time delivered the goods and chattels in this count mentioned, or any or either of them, to the plaintiff, although often requested so to do. To these counts the defendant demurs specially, assigning for cause that the agreement set out is not valid or binding upon the defendant. Joinder in demurrer.

Hagarty, counsel for plaintiff.

Bell, counsel for defendant.

ROBINSON, C. J., delivered the judgment of the court. The plaintiff sues in assumpsit, and the defendant demurs to the first and third counts, and upon the same grounds. The question involved is this: one Smith being indebted to Tyrrell, and Annis being indebted to Smith, can Tyrrell and Annis, without the assent or knowledge of Smith, agree that Annis shall pay Tyrrell the debt due him by Smith, on condition that Tyrrell shall discharge Smith? It can admit of no doubt, in my opinion, that as between Tyrrell and Annis such a contract is binding, though of course Smith's rights cannot be affected by any such arrangement made without his assent. Such transactions are of frequent occurrence. A father, for instance, may agree to pay a debt due by his son, in order to have the latter discharged, and if the creditor does accordingly discharge the son, the father must fulfil his agreement and pay the debt, for it is a promise made upon a good legal consideration, namely—the relinquishment by the creditor of his claim upon the original debtor; that is a right or advantage compromised or parted with by him, and forms a good consideration, entitling him to insist on the performance of the promise made on that condition. It is of no consequence that in such a case the person voluntarily assuming the debt receives no pecuniary or other benefit. It was correctly stated in the argument, that this is in principle an agreement resting on exactly the same grounds as all cases of debts assumed by third parties on the consideration of forbearance to the original debtor, in which action the assent of the debtor to the arrangement is not averred and is not material. Of course, if Annis in this case, having paid the debt of Tyrrell, should seek re-imbursement from Smith, the latter might resist his demand, if there was really no privity on

Smith's part to the arrangement, for no one can make another debtor to a strange party without his assent. There is no substantial difference between the two counts which are demurred to—they turn on the same question. It is expressly stated in both, that the plaintiff discharged Smith, and when he had been thus discharged Smith owed nobody, and could not be prejudiced, if it was done without his knowledge, which is assumed upon the pleading. The circumstance that no debt arose from Smith to Annis on such a transaction is not now in question, and is not material as between these parties. If Annis did in fact owe Smith nothing, he might nevertheless assume his debt to Tyrrell; and if so, then the statement that he was indebted to Smith cannot prejudice this action, because such debt could not be compromised without Smith's assent. If Smith, for instance, had paid Tyrrell before, or had a set-off against him, he would not be in any degree prejudiced by Annis having officially intervened and assumed the debt. *Chancey v. Piggott (a)*, is a declaration like the present, on a similar transaction, and no privity of the original debtor was stated in the declaration. So also is the case of *Stephens v. Pell (b)*. In 2 Chitty's Pleading, 187, there is a similar declaration upon a debt assumed by a stranger, in order to relieve a tenant's goods from a distress, and no assent or privity of the tenant is stated. It is objected to this declaration, that it does not aver that the plaintiff discharged Smith in consideration of defendant's promise, or in pursuance of his agreement. I find that in declarations of this nature—as, for instance, in actions founded on the consideration of forbearance, and generally in actions where the defendant is alleged to have promised in consideration of something undertaken on the other side—it is generally stated that the plaintiff, "confiding in the promise" of the defendant, did forbear, &c., or did whatever act he had stipulated to do, and yet that the defendant had not performed his promise. The books of forms do so, but they do not state the averment to be necessary; and from many cases and pleadings of good authority, I conceive it not to be necessary. A declaration does not require certainty to the same extent as a plea. It is stated here, that in consideration that plaintiff would discharge Smith, defendant would pay to him the debt which he owed to Smith; then when plaintiff avers that he did discharge Smith, of which defendant had notice, the reasonable intendment is, that he discharged him in pursuance of the agreement, and gave defendant notice that he had done so. *Poynter v. Poynter (c)* supports this pleading, so also does *Berisford v. Woodroff (d)*.

BRADBURY ET AL. v. JARVIS, ONE &c.

In an action of special assumpsit against an attorney for negligence in discharging the plaintiff's debtor, who was in custody on a *capias ad satisfaciendum*, without any authority from the plaintiff for so doing, it is no misdirection to tell the jury that the damages are discretionary, and that it is not incumbent on them to give the plaintiffs a verdict for the whole amount of their debt.

Special assumpsit. The declaration charges that the defendant undertook as an attorney to conduct a certain suit for the plaintiffs against one

(a) 4 N. & M. 497. (b) 4 Tyr. 6. (c) Cro. Car. 194.
(d) Cro Jac. 404, and see 7 B. & C. 423.

Loney, to recover a debt, and to charge him in execution, and to keep him charged in execution, until discharged by due course of law, but that notwithstanding his promise, he directed Loney to be discharged, without the knowledge or consent and contrary to the will of the plaintiffs, well knowing that the judgment remained unsatisfied; whereby the plaintiffs have lost their debt. The defendant pleads several defences, denying that he discharged the debtor, and affirming that the debtor was not discharged by any negligence of his. It was proved at the trial that the ca. sa. in the suit against Loney was indorsed to levy 274*l.* 17*s.* besides interest and fees. The learned judge directed the jury that the evidence proved the cause of action stated, and that they should give such damages as they might think the plaintiffs had sustained, but in this form of action damages for the negligence were discretionary as to amount, not necessarily to be taken at the whole debt in the original action, but substantial damages, such as would compensate the plaintiffs for the injury they had really suffered. The learned judge considered that their verdict would not affect the plaintiffs' right to recover against Loney, whatever that right might be. The jury found for the plaintiffs 50*l.* damages. Against this verdict *R. E. Burns* moved last term on behalf of the plaintiffs, on the ground that there was misdirection in regard to the damages, and that the verdict was in consequence too small, contending that the plaintiffs were entitled to recover the whole debt for which Loney was in custody.

Draper, Q. C., shewed cause.

ROBINSON, C. J.—I am of opinion that this rule must be discharged. It was rightly admitted by the plaintiffs' counsel in the argument, that if the plaintiffs could pursue any further remedy against Loney, then they were not entitled as of course to recover the whole amount due upon the execution. The case of *Russell v. Palmer* (*a*), accords with this. But I consider it quite clear that where a debtor in execution has been discharged without satisfaction of the debt, and without the assent or knowledge of the plaintiff, his going at large is an escape, and he is liable to any future execution upon the judgment under the express provisions of the statute 8 & 9 Will. III. ch. 27. which enacts "that if any prisoner in execution shall escape by any ways or means whatsoever, the creditor at whose suit such prisoner was charged in execution at the time of his escape, may retake the prisoner by any new capias, or sue forth any other kind of execution upon the judgment, as if the body of the prisoner had never been taken in execution." The case of *Vigers v. Aldrich* (*b*), is not inconsistent with this, because there the debtor was discharged with the express assent of the plaintiff, who sought to take him again in execution on the ground that he had failed in performing the conditions on which the plaintiff had discharged him. This however the court would not permit. If indeed the debtor should obtain the plaintiff's consent by means of some fraud practised upon him, the case would be different, but that could be no stronger than where there had been no consent of the plaintiff given. I take it besides to be a principle, that in actions which sound wholly in damages as this does, it is discretionary in the jury to give such damages as they think just (*c*).

(*a*) 2 Wills, 328. (*b*) 2 Burr. 2482. (*c*) Bac. Ab. Damages, D. 1.

ANNIS ET AL. v. CORBETT.

A plea to an action of covenant against the assignee of a lease, for rent due under the lease, that all the estate of the lessee in the demised premises did not come to and vest in the defendant as the plaintiff alleges, is a good plea; but in such an action the defendant cannot plead that the lessee was seised in fee before the demise, and conveyed the premises to the defendant in fee, or that the lessee leased to a third party, and that third party assigned to the defendant, concluding in each case with a special traverse of the assignment to the defendant, as such pleas amount to special pleas of *nil habuit in tenementis*.

The plaintiffs sue the defendant, in covenant, as the assignee of a term of one Josiah Hemmingway, to whom the plaintiffs had demised certain premises, for three years' rent. The defendant pleads first, that all the estate of Hemmingway of and in the said demised premises did not come to and vest in the defendant in manner and form as the plaintiffs allege; secondly, that Hemmingway was seised in fee on 9th February, 1839, and, on 29th August, 1840, conveyed the premises to the defendant in fee; and thirdly, that Hemmingway made a lease for five years to Higgins, and that Higgins assigned that lease to defendant; each plea concluding with a special traverse. The plaintiffs demur specially to the first plea, objecting that the denial of the assignment is too large, for that if any part of the estate was assigned to the defendant, he would be liable to pay a portion of rent. The same objection is taken on demurrer to the second and third pleas, but the plaintiffs also object that the defendant is not at liberty to set up facts inconsistent with the plaintiffs' right to demise, and that therefore what is shewn as inducement to the traverse being bad, the plea must fail.

Crooks, in support of the demurrer.

Hagarty, contra.

ROBINSON, C. J.—We are of opinion that the first plea is good. In the case of *Stevenson v. Lombard* (*a*), there was precisely such a plea, and it was not demurred to, though other pleas on the same record were excepted to, and in a case in *Cowper*, 766, the plea was like this. The case of *Curtis v. Spilling* (*b*), establishes that in this case the plaintiffs could not recover, if they could prove only an assignment of a portion, and therefore this plea does not hold them to more than they undertake and are bound to prove. It is not therefore bad as being too large a traverse. And besides, even if the plaintiffs could recover on this declaration, on shewing an assignment of part, still I think the defendant might well plead as he has done here. In *White v. Lombard* (*c*), the court considered that this objection of the traverse being too large, applied rather to the general issue than to a special issue, as this is; I can draw no distinction between that case, where such a traverse was held good, and the present. In *Roberts v. Andrews* (*d*), the same principle is affirmed. This objection cannot prevail against the second and third pleas, for the same reasons as cause its failure to the first plea. But upon the other objections to those pleas, we think that they are exceptionable. The plaintiffs declare upon a demise by indenture; such a demise estops the lessee from pleading *nil habuit*, he cannot deny the right of the lessor to make the lease, and object upon that ground to pay the rent after he

(*a*) 2 East. 576. (*b*) 1 Bing. N. C. 756. (*c*) 2 Salk. 629. (*d*) Cro. Eliz. 84.

has occupied the premises; and this estoppel applies as well to his assignee. If it had not appeared in the previous pleading that the demise upon which the plaintiffs sue, was by indenture, then the plaintiffs must have replied that the lease was made by indenture, and pray judgment whether the defendant should be admitted to plead the plea, but when the declaration states the lease to be by indenture, the plaintiff need not reply the estoppel, but may demur, because the estoppel appears on the record; otherwise if the declaration had been "quod cum dimisissit," without saying that it was by indenture. (a) Now if the defendant meant simply to deny that the plaintiffs made the demise to Hemmingway, or that such demise came to him by assignment, he should merely have tendered an issue upon that fact, but he evidently sets up as his defence something not intended directly to deny either the one or the other, but to confess and avoid them; he avers that he held under a title paramount, for that Hemmingway was seised in fee on the 9th of February, 1839, and that on 29th August, 1840, he conveyed them in fee to the defendant, by virtue of which conveyance he became seised in fee, adding a special traverse that all the estate and term of years of Hemmingway in the demised premises came to and vested in the defendant, as the plaintiffs had alleged. In other words, the defendant pleads that Hemmingway, before the time the plaintiffs made their lease, was the owner of the fee, and continued so until he sold it to the defendant, within the alleged term which the defendant is stated in the declaration to have taken by assignment from Hemmingway, which amounts to saying, that the plaintiffs had no estate to demise on the 26th February, a sort of special *nil habuit*, and the special traverse is nothing more than the conclusion which the defendant draws from the inducement, namely, that as the plaintiffs could not make such a demise as they sue upon, therefore he (the defendant) does not hold under it. But if the matters leading to this traverse are such as the defendant is estopped from pleading, then his inducement is bad in substance, and the plea must fail. (b) For these reasons, we are of opinion that the plaintiffs are entitled to judgment on the second plea, for the defendant has not well confessed and avoided the declaration as he has endeavoured to do. The third plea is also bad, on the same grounds. It is in effect a plea of *nil habuit*, not a denial of the fact of the demise or assignment stated in the declaration, but the defence it sets up is, that Josiah Hemmingway was seised in fee on the 24th February, 1839, and being so seised, leased on that day, to one Higgins, for five years; and that on 24th March, 1841, Higgins assigned to defendant his unexpired term, concluding, as the second plea does, with a special traverse. In other words, setting up such facts as, if true, would establish that the plaintiffs had no right to make a demise such as is stated, but grounds on them a denial of the declaration that the estate was vested in him under the demise and assignment therein stated. If he meant to deny that such a demise and assignment were in fact made, that should have been his defence; but the defence he has made is, that he holds a title inconsistent with such alleged demise and assignment, derived from another quarter; which could not be if the landlord had a right to make the demise.

(a) 1 Saund. 326; 1 Salk, 277; 2 Lord Raym. 1154, 1551; 3 Lev. 146.

(b) Cro. Car. 266, 336.

so stated. This defence the lessee cannot plead, nor can his assignee, though they might have shown that the landlord's title had ceased to exist, either from lapse of time, or by reason of something that had occurred since the demise. There is a difficulty, however, upon which I have been a good deal perplexed, for it arises upon a point which does not seem to be very clearly settled. The defendant, in both these pleas, sets up new affirmative matter in his defence, and then he adds a special traverse, and concludes to the country. Before the new rules of pleading, it had often been a nice question in England, whether the defendant could conclude to the country, or whether he ought not, in respect of the new matter set up by him in his defence, to have concluded with a verification, in order that the opposite party might not be precluded from replying to the new matter affirmatively pleaded. The decisions upon this point in pleading were not easy to be reconciled with each other, and in order to put an end in future to embarrassing questions of this kind, one of the new rules in England provided, that all special traverses, or traverses with an inducement of affirmative matter, should conclude to the country, provided that this regulation should not preclude the opposite party from pleading over to the inducement when the traverse is immaterial. We have adopted the same rule here with this qualification: the new rule leaves it open to the plaintiff, even where the defendant has prematurely concluded to the country, to plead over to the matters stated by way of inducement, notwithstanding such conclusion; so that the propriety of the conclusion is no longer the subject of perplexing and doubtful objections, while it still remains in all cases a question, however the defendant may have concluded, whether his plea is such as must conclude the issue, or whether the plaintiff may properly traverse the inducement to his traverse, or demur to its sufficiency; that depends in each case upon the question whether the traverse was immaterial or not. If the traverse in the case before us was material and necessary, then the inducement, as I conceive, could not be demurred to as insufficient, because without it there would be a perfect issue which must decide the case—that is, the affirmative statement in the declaration denied by the traverse. But where the traverse is unnecessary and immaterial, then the other party may take issue upon the affirmative matter pleaded by way of inducement. The case of *Craven v. Sanderson & Others* (*a*) would lead one to conclude, that in such a case as these pleadings present, the plaintiff might have merely re-affirmed the demise and assignment stated in his declaration, and joined issue upon the plea, without noticing the matter pleaded as inducement to the traverse. But the case ultimately went off upon a point respecting the evidence which should have been received on the trial. What is said by some of the learned judges, during the argument, would lead one to think, that in their opinion it was open to the plaintiff to have replied to the matters pleaded; but that case merely raises the question, but does not settle it, at least not satisfactorily. Now looking at the reason of this, and bearing in mind the principles of pleading, and referring to many cases of an older date (but which do not seem to be over-ruled or questioned, but are everywhere cited as correct decisions), it appears to me that the defendant in this case cannot be looked upon

(*a*) 4 Ad. & El. 666.

as intending to deny the fact of the plaintiff having made such a demise as they declared upon, for in reality he does in terms admit it, by saying, in both pleas, that before the making of the demise stated in the declaration, &c., those facts took place which he sets up as constituting his right to possession, and not the alleged demise and assignment ; he does not, however, mean to confess and avoid the demise, but to treat it as void and inoperative, by reason of the matters pleaded by him ; his plea does in effect traverse the demise, by showing that it was made by one who had no title, and so a special traverse was immaterial and irregular, and cannot conclude the plaintiff from answering the facts pleaded, for the facts pleaded do, of themselves, deny the alleged demise. Properly speaking, the new matters stated in these two pleas of the defendant, do shew that no term could pass by the demise ; and it was not only open to the plaintiffs, but it was necessary for them, to repel the defence, either by denying the truth of the matters pleaded, and so taking issue upon the facts, or by shewing that the defendant is precluded from urging such a defence, and so denying the sufficiency of the application in law. If the fact had not appeared in the previous pleadings, that the alleged demise was by indenture, then the plaintiffs must have replied, stating that to be so, and relied upon the estoppel ; but as the demise had been stated by plaintiffs, and admitted by defendant, to be by indenture, nothing more was necessary for the plaintiffs than to do as they have done, namely, demur to the defence, as one which the defendant is estopped from setting up. In *Bishop of Salisbury v. Hunt & Others* (*a*), plaintiff brought trespass, for carrying away wheat set out for tithes. Defendant justified, under a grant from Queen Elizabeth of the tithe, or corn, growing within the rectory appropriated by Damorham, of which the queen was seised in fee. Plaintiff replied, that before the grant pleaded by defendant, Queen Elizabeth had, on, &c., by letters patent, granted the said tithes to one Stockman for twenty-one years, and had afterwards, viz., on, &c., granted the reversion of the tithes to the Bishop of Salisbury and his successors, and so entitled himself as successor. To this replication the defendants demurred ; and the objection they took was, that the plaintiffs, claiming through a prior grant, had neither confessed and avoided, nor traversed. But Berkeley and Croke, Justices, held, that the plaintiff need not confess and avoid, nor traverse, where he claims by a former grant from the queen, which precedes the title alleged by the defendants ; that if it be not a good grant, the defendants, who claim by a later grant, ought to have traversed the precedent grant to the plaintiff, which is presumed to be good till the contrary is shewn. Brampton, J., doubted at first, but afterwards agreed that the plaintiff, claiming by a former grant, needs to make either a confession and avoidance, or a traverse. *Edwards v. Woader* (*b*) is to the same effect. And it is clear, in my opinion, that the 2nd and 3rd pleas in this case do in effect confess the demise of plaintiffs, and attempt to avoid it by pleading matter which, if true and he could plead it, would make the demise inoperative. The plaintiffs, contending that he is estopped from such a defence, can do no otherwise than demur to it. Stephen's recent Treatise on Pleading was cited in the argument, as shewing that the inducement

(*a*) Cro. Car. 581.(*b*) Cro. Car. 323.

could not be demurred to, or traversed, which is undoubtedly true in those cases where the special traverse is admissible and necessary, but not where the traverse was unnecessary and irregular, which I take to be the case here; because the new matters of defence pleaded were relied upon as over-ruling in law the demise, which is admitted was made in fact, and the traverse added to such a plea could be nothing more than a legal inference drawn from the new facts, which new facts the plaintiff must therefore be allowed to repel. In Sergeant Stephen's Treatise, the doctrine of the special traverse is most clearly explained, and a consideration of the principles which he lays down will shew very plainly, in my opinion, that the plaintiffs could properly demur to these pleas; and the ground of demurrer being clear, the plaintiffs are entitled to judgment on the demurrer to those pleas, and the defendant to judgment on the demurrer to the first plea.

Judgment for defendant on first plea, and for
plaintiffs on second and third pleas.

CONNELL ET AL. v. CHENEY.

If a judge misdirect a jury, the court will not necessarily grant a new trial for the misdirection, if they be satisfied that justice has been done between the parties notwithstanding the misdirection.

Assumpsit on the common counts. Pleas, general issue and set-off. At the trial it was proved that the plaintiff made a waggon for the defendant, for which he was to be paid partly by an old waggon of the defendant's, and the remainder in lumber. The evidence was loose and unsatisfactory, and did not place the case on a clear ground, so that it was difficult to determine whether the action should have been on the special agreement, or might be maintained on the common counts. The learned judge, though he doubted upon the point, ruled in favour of the plaintiff, and this ruling was now moved against as a misdirection. The learned judge, however, reported to the court that he was satisfied with the verdict on the merits.

Bell shewed cause.

ROBINSON, C. J., delivered the judgment of the court. If it had appeared by the evidence that, in consideration of the new waggon to be made for him, the defendant was to deliver a certain old waggon to the plaintiff, and also to deliver a certain quantity of any description of lumber, and that he had failed in delivery of either, then it would clearly have been a case in which the plaintiff must have brought his action upon the special agreement; for the measure of damages in that case would have been, not the value of the new waggon made for him, but the value of the property which he ought to have delivered in return for it, estimated at the time when he undertook to deliver it. And there is an obvious justice in this, because otherwise the party who had made the most advantageous bargain in the intended exchange would lose the advantage; but we cannot apply this consideration in the present case, from the nature of the evidence. It was not proved at what particular sum the waggon was valued, or whether any price was named; while, on the other hand, it was not proved, what kind of lumber was to be delivered in payment, or what quantity, or to what estimated value; for

it was sworn that the defendant was to give an old waggon in part payment, and deliver lumber for the rest. But, for the rest of what? We hear of no sum named which was to be made up in lumber. As the only means of arriving at a calculation, therefore, the plaintiff endeavoured to prove what the waggon he made for the defendant was worth, and what the old waggon was worth, and then deducting the one from the other, he held the defendant accountable for the worth of as much lumber as would make up the balance in money, and shewing that he had not delivered lumber enough for that purpose. Now, this is manifestly arriving at the very same result, as to the measure of damages, as if a particular sum had been named by the agreement, in the first instance, as the price which the plaintiff was to receive for the waggon; in which case, the decisions in the cases of *Waddel v. McCabe*, and *Teal v. Clarkson*, decided in this court, and referred to in the argument, might have applied. They proceeded upon the principle of many English decisions, namely, that when a debt exists which the debtor is to be permitted to pay in stock or labour, or in some other way than in money, if the party does not make the payment in such particulars named according to the agreement, he loses the privilege for which he stipulated, and may be made to pay the same sum in money. There being no sum named which the plaintiff was to have received, and no specific thing, as to quantity or value, which the defendant was to deliver, I do not know how a balance could be struck between them on any other principle of calculation than that which was adopted at the trial; and admitting that it is a question, as the learned judge thought it was, whether, in such a case as this, the special agreement could alone be sued upon, yet if such evidence only could be given as was given upon the last trial, I do not know how a jury could come to any conclusion between the parties except by valuing the new waggon, deducting the value of the old one from it, and giving damages for the balance, after allowing for the value of the lumber that was delivered. This being so, if we felt quite clear, that strictly speaking the action should have been on the special agreement, still it does not follow, that in a matter of this trifling nature, because the objection was raised at nisi prius we must of necessity set aside the verdict in order to compel the plaintiff to arrive at precisely the same result by another form of action. This would indeed be granting a new trial upon a point of *summum jus*, and not in order to advance the substantial ends of justice. It is laid down in the most modern books of practice, "that if a judge misdirect the jury, it is in general a good ground for a new trial, unless the court be satisfied that justice has been done between the parties notwithstanding the misdirection." (a) The court would unwillingly allow a party to suffer any prejudice from a clear misdirection, but here we cannot say that the defendant has been in any degree injured. The verdict seems fair upon the merits, and no reason can be gathered from the evidence why he ought not to have paid the small balance now claimed.

(a) 2 T. R. 4; 1 B. & P. 338.

BANK OF B. N. A. v. HOLMAN ET AL.

Where in an action against the indorsers of a promissory note, the defence was that the note had been stolen from one of the indorsers, and had been delivered to the plaintiffs, knowing it to have been stolen, and that they did not take it in good faith, and the plaintiffs' attorney, by whom the note had been taken on their behalf, was offered as a witness at the trial, to prove the circumstances under which it was taken, but being objected to as responsible over to the plaintiffs, if the note had been taken through his negligence, was rejected. It was held that his rejection was improper, and that he was a good witness without a release.

Plaintiffs sue on a promissory note, made by Holman, and indorsed by the two other defendants, Webster and Helm. The defendants plead, that before the note was delivered to the plaintiffs, it was feloniously stolen from Holman, and received by one Moon, knowing it to have been stolen ; and that Moon afterwards assigned it to the plaintiffs, who did not take it in good faith, but without due care and caution, and were guilty of gross negligence in taking the same. The note was taken by Mr. Crooks, who was acting as attorney for the plaintiffs in collecting a debt, and took this note in payment : it was brought to him by Moon. There were some circumstances proved in the case, which it is contended were sufficient to have awakened Mr. Crooks' suspicion that the person bringing the note to him had not come honestly by it, as was clearly made out to be the case afterwards, for the note was stolen, and Moon has since been convicted of receiving it, knowing it to be stolen. Mr. Crooks was tendered as a witness, to explain under what circumstances he received the note ; but he was objected to, on the ground that, if he was guilty of gross negligence, he would be liable to his clients, and was therefore an incompetent witness to disprove the negligence imputed to him. The learned judge thought so, and rejected him. Upon the case as it appeared, the jury were directed to find for the plaintiffs, or not, according as they were of opinion that gross negligence in taking the note had or had not been proved ; with an opinion, however, expressed that the evidence did not shew a clear case of that kind : they found, nevertheless, for the defendants. A new trial was moved for by the plaintiffs, on the ground that Mr. Crooks was a competent witness, and should not have been rejected, and also on the ground that the verdict is contrary to law and evidence.

Crooks, counsel for plaintiffs.

Baldwin, Q. C., counsel for defendants.

ROBINSON, C. J.—We are of opinion that Mr. Crooks, the agent and attorney of the bank, was a good witness to explain what he had done as agent without a release : first, because he was an agent, and from the necessity which creates an exception in such cases, notwithstanding his being accountable if he was culpably negligent ; and secondly, because he could only be made liable through the verdict in this action, and his name being indorsed on the record would prevent (under the statute) this recovery from being given in evidence against him : this latter ground, however, may be still open for argument, as the decisions upon the point have been rather conflicting. We allow, therefore, a new trial without costs ; and as it may save the parties trouble and expense, we will further

intimate our opinion, that upon such facts as were proved at the trial the plaintiffs were entitled to recover even without Mr. Crooks' evidence; the current of modern authorities is strong against the sufficiency of the defence, and we call the attention of the parties to the fact, that the plaintiffs did not pay out value for the note, but only took it in payment of a debt before due them, and which would remain still due, if this turned out from the circumstances to be no judgment. The parties must consider whether, under such circumstances, the defence can be said to rest upon the same grounds as if the plaintiffs had discounted the note.

Rule discharged.

DOE DEM. STODDERS v. TROTTER.

Where a defendant was in the possession of land, under an agreement to purchase, the purchase-money being payable by instalments, and after the payment of the first instalment failed in the payment of any of the others, but remained in possession for many years, until the plaintiff offered to give him a deed on certain terms, which were not complied with, and told him that he might remain in possession for the summer, if he would leave the land in the autumn, which the defendant refused: Held—that the jury, having found that the plaintiff had at this time determined the holding at will, that the defendant was not entitled to a demand of possession.

Ejectment. It was proved at the trial, that the lessors of the plaintiff had contracted with the defendant to sell him the premises in question at a certain price, to be paid by instalments, in 1839, and in the month of December of that year the first instalment was paid, the defendant having taken possession, but default was made in the payment of the subsequent ones. In April, 1843, the plaintiff offered to make the defendant a deed of the land, if he would pay half the money then due in the following November, and the remainder in the winter after, and give security for the latter payment, or that he might take his spring crop off, if he would give up possession in November; the defendant, however, refused to do so, unless he got back the first instalment paid. He never made any further payment, nor gave any security, but continued in possession. The demise in the declaration was laid from 2nd May, 1843. The learned judge left it to the jury to find, whether the plaintiff had not determined his will before the 2nd May, which he thought he must be taken to have done, if, in consequence of what passed between them in April, 1843, the defendant must have known that by remaining on the land without giving security or paying, and determining not to leave in November, unless he received back his instalment, which the plaintiff would not agree to return, he was living there without the plaintiff's assent. The jury found for the plaintiff, and *Duggan* obtained a rule nisi, last term, for a new trial for misdirection.

Brough shewed cause.

ROBINSON, C. J., delivered the judgment of the court. The defendant was in on an agreement to purchase, having failed in his engagement to pay on certain days; but, notwithstanding such failure, he contends that he cannot be treated as a trespasser without evidence of an explicit demand of possession, and that there was no such evidence here. There is clearly no such principle of law; on the contrary, the general principle is, that where a party's right to possession depends on his making

certain payments, if he fails, he is liable to be dispossessed without notice. Here, however, there was an acquiescence of some years after a failure; and the parties, in April, 1843, entered into a new treaty, under which the defendant was given clearly to understand, that he must give up the place unless he found security that he would make the payments at an earlier time. The jury were requested to say, whether, upon the facts proved, they were satisfied that the plaintiff had determined his will before the demise laid in the declaration, and they found he had. I cannot say their finding was against evidence, though the proof was not very clear and precise, and on the whole case I am not for interfering with the verdict.

Rule discharged.

ROOT QUI TAM v. WOODWARD.

Where in a qui tam action for usury, the plaintiff was nonsuited for not producing certain promissory notes, in the negotiation of which the usury had taken place, the only evidence offered to account for their non-production, having been a letter that they were not to be found in the office of the judge's clerk, where it was sworn they had been filed, the court refused to set aside the nonsuit upon affidavit that they had been found since the trial.

Debt, for penalty on the statute against usury. Pleas, denying the corrupt agreement, and several special pleas. At the trial the plaintiff was nonsuited, because he did not produce the promissory notes set forth in his declaration, upon the transfer of which the usury was laid to have taken place. He proved, however, that the notes had been filed in another cause at a former assize; and offered in evidence a letter from Toronto, stating that a search had been made for them in the office of the judge's clerk, where they ought to have been filed, and that they could not be found; and gave notice to the defendant's attorney to produce them, as he believed that they were in his possession.

Boulton, Q. C., having obtained a rule to set the nonsuit aside on these facts, and on affidavit that the notes had since been found in the office of the judge's clerk,

Crawford shewed cause.

ROBINSON, C. J., delivered the judgment of the court. We think we ought not to grant this application. The plaintiff did not, in the first place, use due diligence; then he ought not to have gone to trial without having the evidence, which he ought to have known was indispensable to his case. He chose to go to trial wholly unprepared to make out his case; and he did not prepare himself with evidence, even to shew that he had made the search he now swears to; he was consequently nonsuited, and we cannot now allow him the extraordinary indulgence he desires, in order to enable him to take his cause down to trial a second time, in the hope of being able to make out a better case as informer in an action for a penalty.

Rule discharged.

CAMERON v. TARRATT.

In an action on a covenant in a lease, that the defendant had not encumbered, charged or affected the premises leased in any manner, and assigning as a breach that A. and B., claiming under the defendant prior to the plaintiff's lease, and having a right to certain fixtures on the leased premises from the defendant, would have entered to remove them, if the plaintiff had not paid them for them, the defendant pleaded, first—that A. and B.'s title had expired before the said time when, &c., and that they had no right at the time alleged to the fixtures, &c., concluding to the country; and secondly—that before the lease to the plaintiff, the defendant had leased the same premises for five years to C., who had a right under the lease to the fixtures, which were trade fixtures, that C. assigned to A. and B., who claimed these fixtures as trade fixtures. On special demurrer by the plaintiff to these pleas, the court held the first good and the second bad.

Covenant. The plaintiff declares, for that whereas heretofore, to wit, on the 7th day of December, in the year of our Lord 1842, by a certain indenture then made between the defendant and plaintiff, one part of which indenture the plaintiff now brings into court here, sealed with the seal of the defendant, the defendant did grant, bargain, sell, assign, transfer and set over unto the plaintiff, his executors, administrators and assigns, a certain messuage or shop, and dwelling-house and premises, situate in the city of Toronto in the said district, to have and to hold the same to the plaintiff, his executors, administrators and assigns, from the 1st day of September, in the year of our Lord 1838, to the full end and term of twenty-one years, from thence next ensuing, and fully to be complete and ended, as by reference to the said indenture will, among other things, more fully and at large appear: and the defendant did thereby covenant, promise and agree with the plaintiff, that he, the defendant, had not at any time since the said 1st day of September, 1838, made, done, omitted, committed, executed, or knowingly or willingly permitted or suffered, or been party or privy to any act, deed, matter or thing whatsoever, whereby or by reason or means whereof the said messuage or shop, lands, tenements, hereditaments and premises, thereby assigned or intended so to be, or any of them, or any part thereof, were, could, should or might be in anywise impeached, charged, affected or incumbered, as by the said indenture (reference being thereunto had) will more fully and at large appear, by virtue of which said sale and assignment the plaintiff ought to have been able and allowed to enter the said messuage or shop, and dwelling-house and premises, and to have become and be thereof possessed, in manner and for the term aforesaid; but the plaintiff says that the defendant, since the 1st day of September, 1838, had impeached, charged, affected and incumbered the said messuage or shop, and dwelling-house and premises, contrary to the true intent and meaning of the said covenant; and one John George Bowes, and one John Hall, having a lawful right and title to the said messuage or shop, and dwelling-house and premises, for the residue of a certain term of years, then unexpired, derived by and from the defendant, after the said 1st day of September, 1838, to wit, on the 4th day of September, 1838, and lawful right and title to certain shelves, counters, boxes and other fixtures, being affixed and fastened to the freehold, and being in and upon the said messuage or shop, by and from the defendant to take,

remove and carry away the same counters, shelves, boxes, and other fixtures, would have entered into the same in and upon the possession of the plaintiff against his will, and would then and there have taken, removed and carried away the said counters, shelves, boxes, and other fixtures, so being in manner and form aforesaid in and upon the said messuage or shop, and thereby greatly injured, damaged and destroyed the same, if the plaintiff had not paid, and he was then and there, for the reason aforesaid, forced and obliged to pay to the said Bowes and Hall a large sum of money, to wit—one hundred pounds, as and for the price or value of the said counters, shelves, boxes and fixtures, so being affixed and fastened to the freehold, and being in and upon the said messuage or shop as aforesaid—concluding in the usual form. The defendant pleads, 1st—that the title of the said Bowes and Hall, in the declaration mentioned, expired on, to wit—the 25th day of March, in the year of our Lord 1843, and before the said time when, &c., in the said declaration mentioned, and that at the said time when the said Bowes and Hall had not, nor had either of them, lawful right or title by or from the defendant to the said messuage or shop, and dwelling-house, or any or either of them, or any part thereof; to the said shelves, counters, boxes and fixtures, or any part of them, or to enter into the said messuage or shop, to take, remove, or carry away the same shelves, counters, boxes and fixtures, or any part of them, or to enter into the said messuage or shop, to take, remove or carry away the same shelves, counters, boxes and fixtures, or any or either of them, or for any other purpose whatsoever, by or from the defendant, in manner and form as the plaintiff hath above in his declaration alleged, and of this he puts himself upon the country, &c. In a second plea the defendant says, that on the 4th September, 1838, he leased to one Westmacott for five years, and that Westmacott assigned to Bowes and Hall, and that the fixtures in question were trade fixtures, and were properly removable by Bowes and Hall. To these pleas the plaintiff demurs specially, assigning for cause—to the first, that it confessed, but did not avoid the breach, and concluded to the country, instead of with a verification; and to the second, that it was no answer to the breach complained of, but admitted it. Joinder in demurrer.

Boulton, Q. C., counsel for plaintiff.

Adam Wilson, counsel for defendant.

ROBINSON, C. J.—We are of opinion that the first plea is a good plea. It was not necessary to conclude with a verification, for it amounted to nothing more than a denial of a statement made in the declaration of a fact indispensable to the plaintiff's right of action, namely—that Bowes and Hall, at the time of their alleged interruption of plaintiff's right, held a title derived from defendant, as plaintiff alleged: this is no new affirmative matter pleaded by defendant, but a mere denial of a statement, of which the burden of proof lies on the plaintiff; the plea, therefore, properly concludes to the country. Upon the second plea, we think that the plaintiff is entitled to judgment, for that plea admits that the defendant gave to Westmacott power to permit Bowes and Hall to remove fixtures, and that he gave this power on 4th September, 1838; but in the covenant declared on, defendant covenanted, that he had done no act, since 1st September, 1838, by which any person claiming lawfully under him could in any manner affect, incumber, &c., the premises demised to the plaintiff.

Now it may be true, that the fixtures in question were trade fixtures, such as it was reasonable, between the defendant and Westmacott, that the latter should be allowed to remove, but then that should have been guarded against by an exception in the defendant's covenant to the plaintiff; and not being excepted, the plaintiff has been deceived and the covenant broken, for no one can deny that when he has bought or leased a shop fitted up with counters and shelves fixed to the freehold, it is an injury to him to find that some third party has a right, of which he was ignorant, to enter and remove those fixtures. The defendant does not demur to the declaration, but pleads over that he gave the title under which Bowes and Hall acted on 4th September, 1838, which was long before defendant made his covenant to plaintiff, and he cannot therefore object to the declaration, that it does not state it to be before the covenant, for he admits that it was: when time is material, it will be taken against the party pleading, as being positively stated, though under a videlicet (a). The breach is clearly within the express words of the covenant. As to the objections, that the deed set out in oyer appears to have been defec-tively executed, and that it is not shewn that plaintiff had been actually obliged to pay any money to Bowes and Hall in consequence of this claim, they were well answered on the argument. The defendant's pleading admits the lease to plaintiff; its due execution, therefore, is not in question, and if plaintiff has paid no money to Bowes and Hall, the covenant is nevertheless broken the moment it is shewn that they had advanced a claim, and were in a situation to do so through a deed made by defendant contrary to his covenant.

MCLEAN, J., and HAGEMAN, J., concurred.

Judgment for defendant on demurrer to 1st plea, and
for plaintiff on demurrer to 2nd plea.

FRASER QUI TAM v. THOMPSON.

In a qui tam action for usury, any variance between the statement of the time of forbearance laid in the declaration and the time proved, is fatal.

Qui tam action for usury, under 51 Geo. III. c. 9, s. 6. The plaintiff in his declaration avers, that the defendant, on 4th January, 1844, upon a certain corrupt contract, made after the passing of the statute, viz. on 5th September, 1842, between the defendant and K. M. Sutherland and J. B. Sutherland, took and received from them a certain sum of money, viz. 150*l.*, by way of a corrupt bargain and loan, for the defendant forbearing and giving, and having forborne and given, day for the payment of a certain sum, viz.—1000*l.*, theretofore, to wit, on 5th September, 1842, at, &c., lent and advanced by the defendant to the said K. M. S. and J. B. S., from the day and year last aforesaid (i. e. from 5th September, 1842) until 5th September 1843—concluding in the usual form. In a second count, the plaintiff lays the corrupt agreement on 3rd September, 1842, and states the 150*l.* to have been given for the forbearance of 1000*l.*, for a year from the said 3rd September, 1842. Plea, nil debet. It was proved at the trial, that on 5th September, 1842, it was agreed between the defendant and the Sutherlands, that the defendant should lend them 1000*l.*, to be repaid in a year from that day,

with 15*l.* per cent. interest ; and, in pursuance of that agreement, the Sutherlands gave a mortgage to the defendant, on 5th September, 1842, for 1150*l.*, payable in a year, which was in fact agreeing to pay the 15 per cent. in advance. The 1000*l.*, however, were not paid in one sum, but as follows :—400*l.* on 3rd September, 1842 ; 300*l.* on 5th of September, 1842, to take up a discounted note of the Sutherlands, which he had indorsed for them ; 100*l.* on 16th September, 1842 ; 100*l.* on 24th December, 1842 ; and 100*l.* on 1st February, 1843. On this last day the defendant and the Sutherlands had a settlement of accounts ; defendant at that time assumed, on account of one Fraser, a debt of his, amounting to 116*l.* 12*s.*, and the defendant allowed them a rebate of interest at the rate of 15*l.* per cent. on such portions of the 1000*l.* as had not been paid on 5th September, 1842, from that day to the time of making the respective payments ; this rebatement of interest, added to Fraser's debt, and the 100*l.* remaining due of the 1000*l.*, made up 229*l.* 16*s.* 6*d.*, and the defendant, on that day (1 February, 1843), gave them his note for that sum, payable at three months, including also the interest on that note for the time it had to run. The 1000*l.* was repaid, with the 150*l.* interest in bank-stock, taken as money, and not in cash. The defendant's counsel objected that there was a variance between the time of forbearance laid and that proved, and that the repayment was in bank-stock, and not in money, as laid. The learned judge over-ruled these objections, leaving it to the defendant to renew them in term. The jury found for the plaintiff, and 3000*l.* damages, and Blake, for the defendant, last term obtained a rule nisi for a new trial on the law and evidence, and for misdirection, and also for the rejection of proper evidence offered by the defendant.

Boulton, Q. C., shewed cause.

ROBINSON, C. J.—We have no doubt upon the point, that on account of the variance the verdict cannot be sustained. It is not true that 1000*l.* were forborne from 5th September, or from 3rd September, so that neither count was proved as laid : 400*l.* were forborne from 3rd September, and 600*l.*, in effect, from 5th September, though not strictly so, but only 300*l.*, and the rest from other days. The courts have ever required that the declaration and evidence shall strictly correspond in respect to the time of forbearance, and we cannot govern ourselves in such a case by any new rule.

MCLEAN, J., and HAGEMAN, J., concurred.

Rule absolute.

CORKERY V. GRAHAM ET AL.

In covenant against a sheriff's sureties, the breaches assigned were, first, that the sheriff did not arrest the debtor in the original action on a ca. re. delivered to him, but falsely returned non est inventus, and, secondly, that he arrested him, and afterwards allowed him to escape. The defendants pleaded, to 1st breach, that the sheriff did not falsely and deceitfully return, that the debtor was not found in his district; and to the 2nd, that the gaol was accidentally destroyed by fire, and so the debtor escaped. Both pleas were held bad :—the first, as containing a negative pregnant ; and the second, for not denying that the fire occurred through the negligence or default of the sheriff or his deputy.

Covenant against the sureties of the sheriff of the district of Bathurst, under the statute 3 Will. IV. c. 8, for alleged wilful misconduct in the sheriff, in not arresting one James O'Connor on a writ of capias ad

respondendum delivered to him, and falsely returning that he was not found in his district. Plaintiff assigns, as a further breach, that O'Connor was surrendered by his bail to the sheriff, who allowed him to escape. The defendants plead to the first breach, that the said John A. H. Powell, so being sheriff as aforesaid, did not on the day and year aforesaid, being the return of the said last-mentioned writ, falsely and deceitfully return upon the said last-mentioned writ to the said district court aforesaid, that the said James O'Connor was not to be found in his district, as in the said breach is alleged and set forth, and of this they, the said defendants, put themselves upon the country. The defendants plead to the second breach, that after the surrender of the said James O'Connor by his bail in discharge of themselves to the custody of the said John A. H. Powell, so being sheriff as aforesaid, and after he, the said John A. H. Powell, had received the said James O'Connor in the gaol of the said Bathurst District, for the cause aforesaid, to wit, on the day and year aforesaid, to wit, at Perth aforesaid, the said gaol of the Bathurst District, where the said James O'Connor was kept and detained in custody, to wit, at Perth aforesaid, accidentally took fire and was consumed and destroyed, and that during the conflagration of the said gaol, the said James O'Connor, then being in custody of him the said John A. H. Powell, Esquire, sheriff, upon such surrender in discharge of the bail of him the said James O'Connor, to wit, on the 1st day of December aforesaid, with force and arms, privately, secretly and clandestinely, against the will and without the knowledge of the said John A. H. Powell, sheriff as aforesaid, escaped from and out of the said gaol, and out of the custody of him the said John A. H. Powell, so being sheriff aforesaid, and fled and escaped to places to the said John A. H. Powell, Esquire, unknown, to wit, at Perth aforesaid, without this, that the said John A. H. Powell did voluntarily suffer the said James O'Connor to escape out of his custody, and out of the gaol of the said Bathurst District, and to go at large, in manner and form as the said plaintiff hath complained against them the said defendants, and this they are ready to verify. The plaintiff demurs specially to the first plea, as containing a negative pregnant, and generally to the second plea. Joinder in demurrer.

Sherwood, Q. C., counsel for plaintiff.

Adam Wilson, counsel for defendants.

ROBINSON, C. J., delivered the judgment of the court. The first plea is clearly bad: the breach is, that the sheriff might have arrested, and had notice and did not, and falsely returned that he could not find the debtor. The plea answers this by saying, that he did not falsely and deceitfully return that the debtor could not be found. This involves a double defence:—1st, that he made no such return; 2ndly, that it was not false: he could not plead both in one plea, and therefore this is an instance of a negation pregnant fatal on special demurrer. The second plea is not, in my opinion, a good defence, because it does not expressly aver that the gaol took fire without the negligence or default of the sheriff or his deputy, but merely accidentally. The accident, however, may have arisen from gross negligence, such as would amount to misconduct of the sheriff or his officer. If it had been well pleaded, I incline to think, that though the gaol being burnt, otherwise than by the act of God, would not acquit the sheriff from an escape in law, yet that would not be such

misconduct as would come under the covenant. As to the effect of the sheriff's death pending the action; 1 Vic. c. 7, enables the plaintiff to proceed against his executors or administrators in a separate action. I think our statute, 3 Will. IV., c. 8, s. 16, does not produce the effect of abating this action, but the plaintiffs might proceed to judgment, and the defendants may, if so advised, apply to stay proceedings on the judgment till the sheriff's representatives are sued, and an attempt made to get the debt from his estate.

Judgment for plaintiff.

QUEEN'S BENCH,
HILARY TERM, 8 VICTORIA.

The Judges sitting in court this Term were—

THE CHIEF JUSTICE,
MR. JUSTICE JONES,
MR. JUSTICE HAGERMAN,

MR. JUSTICE MACAULAY being absent in England, and MR. JUSTICE MCLEAN sitting in the Practice Court.

MR. JUSTICE JONES, having presided in the Practice Court last Term, gave no judgments in cases then argued in this court.

IN RE H. J. BOULTON, Q. C.

A patent from the crown, appointing a barrister a Queen's counsel, directed that he should take precedence next after another Queen's counsel, who was subsequently appointed Attorney-General. Held—that such patent did not then entitle him to precedence before the Solicitor-General.

Boulton, Q. C., moved the court for precedence in motions next after her Majesty's Attorney-General for Canada West, the Hon. W. H. Draper, on the ground that the crown, by patent, on 15th September, 1842, had appointed him one of her Majesty's counsel in Upper Canada, and had directed him to take precedence in all courts of law and equity in Upper Canada "next after the Honourable William Henry Draper." The effect of the granting of Mr. Boulton's motion would be to give him precedence before Mr. Sherwood, her Majesty's Solicitor-General for Canada West.

ROBINSON, C. J., delivered the opinion of the court.—We consider that the effect of the patent is to give Mr. Boulton rank among the Queen's counsel next after the place in which Mr. Draper ranks as Queen's counsel, without reference to Mr. Draper's official rank, and consequently that he does not take precedence of the Solicitor-General. According to what Mr. Boulton claims, if Mr. Sherwood had ranked above Mr. Draper, as Queen's counsel, before their respective appointments to be Attorney and Solicitor-General, then, in consequence of Mr. Draper having been promoted to the higher office, Mr. Sherwood would lose his proper professional precedence, and be postponed to Mr. Boulton.

THIRKELL v. MCPHERSON ET AL.

Where flour was delivered to the defendants, who were warehousemen and common carriers, with directions to sell such portion of it as they could during the winter, and put the remainder in transitu for the plaintiff in the spring, and some sales having been made, before the navigation opened in the spring an accidental fire destroyed the remainder of the flour, without any default or negligence of defendants. Held—that as the flour, at the time of the fire, was in the hands of the defendants, as warehousemen and not as common carriers, that they were not responsible for its loss.

The Plaintiff sues in case, charging that the defendants, on 1st April, 1840, were common carriers from Kingston to Quebec, and that the plaintiff then delivered to them, as such carriers, two hundred barrels of flour, &c., to be carried for him by them, as such carriers, from Kingston to Quebec, and at Quebec to be delivered by the defendants for the plaintiff for reward, &c.; then it charges the duty incumbent on the defendants as common carriers, that they neglected to carry and deliver them, and that by their negligence the flour has been lost to the plaintiff. The defendants plead that the plaintiff did not deliver to them, and that they did not receive the flour, or any part thereof, for the purpose or upon the terms in the declaration mentioned. The facts proved were in substance these:—A Mr. Counter, who had been a warehouse keeper and commission merchant in Kingston (not a common carrier), in the autumn of 1840 had received from this plaintiff a large quantity of flour, with instructions to sell what he could during the winter, and to forward what might remain to Lower Canada in the spring. In March, 1841, he received a letter from the plaintiff, desiring him to send whatever might remain in the spring to Messrs. Forsyth & Bell at Quebec. Before this, and some time during the winter, Counter had leased his warehouse and premises to the defendants, who were then, and had been before, carrying on the business of common carriers between Kingston and Quebec. The warehouses were to be put into a state of repair by Counter during the winter, and in order to do this it was necessary to remove whatever was stored in one of the old buildings, into a new store that was then being erected by Counter for the defendants. Accordingly, on 10th April, 1840, Counter desired the defendant's clerk to receive into the new store, the goods which he had to that time kept deposited in the old warehouse, among which was this flour of the plaintiff's. They declined receiving anything without being furnished with a regular list describing the packages, the person for whom stored, and the destination, &c.; but on Counter's requesting them to let it be turned into the new store, that he might be able to go on with the repairs of the old building, they agreed that he might, on giving them a list of the packages with the marks generally, but on the express declaration, that the goods were not to be considered at the risk of the defendants, until the regular list should be given, as is usual in the trade, which Counter assured them he would do without delay. The clerks gave no receipt for the goods, as they did in other cases, because they said they declined to take any responsibility until the proper bill or list should be furnished. These clerks in charge swore that it was the express understanding between them and Counter, that the flour was only received temporarily for Counter's accommodation, and that the defendants were not to be accountable until they received a

proper bill. Counter swore that he had handed to McPherson, one of the defendants, the letter which the plaintiff wrote to him in March. McPherson, of course, could not be called either to confirm or contradict this. The clerks swore that they knew nothing of any such letter. If it was received by McPherson it would probably have been about the 10th April, and would have merely conveyed to the defendants the information, that the plaintiff wished any of the flour that might remain over at the opening of the navigation to be forwarded to Messrs. Forsyth & Bell at Quebec. Counter proved that he did also expressly tell one of the defendants, that the plaintiff wished his flour that remained unsold, to be sent in the spring to Forsyth & Bell, and that the defendants undertook to take it to Quebec accordingly. The stores contained other goods of various persons, some of which had been left with Counter, to be forwarded by such persons as he might employ, and some merely to be kept until sold. In making over his warehouses for a term of years to the defendants, Counter arranged with them that they should forward whatever remained in his warehouses for that purpose, when the season for transportation should arrive. It was proved that the season for transporting on the river St. Lawrence usually commences from the 7th to the 10th May, and sometimes later. There happened unfortunately to be an extensive conflagration at Kingston, on the 18th April, arising from an accident in no degree attributable to these defendants; and, with many other buildings, these warehouses of Counter's were destroyed, with their contents, among which were 139 barrels of flour belonging to the plaintiff, which remained of that stored by him with Counter in the autumn preceding, and stored with the instructions that he was to sell what he could at Kingston, and to send down the remainder in the spring, such instructions being varied only in this respect by the letter afterwards written to him (in March), by which he was then informed to what particular consignees at Quebec the plaintiff wished his flour to be sent. Nothing whatever was ever alleged to have passed between the plaintiff and the defendants, either in writing or verbally, before the loss of the flour. Upon his examination, Mr. Counter stated, that if he had retained his warehouses as before, and had not leased them to the defendants, he would have let the flour lie in store till the season for navigation opened, and would then have delivered it over to some carrier to be transported when his boats were ready to receive it, and not before. With regard to what could be called the opening of the navigation, it was proved on this trial, as it has been in other cases before the court, that the river is generally open earlier than the Rideau canal; that produce is sent sooner by the river, but as the barges which take it down can only return by the canal, the season for transportation does not in fact commence till the canal is free from ice as well as the river, and more especially as the custom is to continue sending down barges in the autumn as late as the river continues open, which is some time after the canal is frozen up, so that the boats are in general laid up below during the winter, and must be able to return in the spring by the canal, before the business of transportation down the river can begin: this period had certainly not arrived on the 18th April, when the fire occurred. The jury gave a verdict for the defendants, and the plaintiff moves to set it aside, as being against law and evidence, and for misdirection. In sup-

port of the rule, an affidavit made by Mr. Counter is filed, who was a principal witness examined on the part of the plaintiff at the trial: he states nothing new, and alleges no surprise or mistake in giving his former evidence without stating in his affidavit those qualifying circumstances which were elicited upon his *vivâ voce* examination, and which were very material to the principal question, namely, in what capacity did the defendants hold the flour at the time that it was accidentally destroyed by fire, as proved at the trial?

Crawford, counsel for plaintiff.

Draper, Q. C., counsel for defendants.

ROBINSON, C. J.—It appeared to me at the trial, independently of the material fact, that the defendants' witnesses swore that this flour was lying in the store at Counter's risk, and had never been taken in charge by the defendants up to the time of the fire, a list having been several times asked for, but never received; that upon the nature of the transaction itself, the flour was not in the hands of the defendants as common carriers, but only as warehouse keepers, as Counter had held it, and with no stricter responsibility than would attach to them in that character. The difference is one on which the case turns, because it is only as common carriers that they are charged in this action, and it is only as common carriers that they would be liable in law for a loss occurring from a fire under such circumstances. If the defendants had been in business in Kingston, as common carriers, in the autumn, using then these same warehouses, and had received the flour from the plaintiff as Counter did, with directions to sell what they could during the winter, and afterwards, in March, had received a letter, such as Counter states he had received, requesting that when the navigation opened, they would send what remained to Quebec, it would seem unreasonable, as I told the jury, to hold that the receiving that direction would change the nature of their custody of the flour in the mean time, and relieve the owner of the article from a risk which undoubtedly rested on him before, by rendering the defendants liable, as carriers, for all accidents, even before the time should arrive when the season for transporting should commence; or, in other words, before the owner expected or intended the flour could be carried, and when he knew it could not be. I told the jury, that after the decisions which had been given in this court in other cases of loss occasioned by this fire, I could not now hold, though I had dissented from those judgments, that when goods were sent in the winter to a common carrier by water to be transported in the spring, his liability as a common carrier did not attach till the period came when the opening of the navigation enabled him to put them in *transitu*, and before which it was well known and understood by the owner, that they could not be carried, and must therefore be stored in the meantime for his convenience. But I considered that this case differed most materially from those, in its special circumstances, so that if I had concurred in the former judgments, my opinion would be nevertheless against the plaintiff's right of action in this case. It was clear that Counter held the flour only as a warehouse keeper up to the 10th April, when, to serve his own convenience, he turned it into the defendant's store, with the direction which he had received himself, as to the course to be taken with it in the spring; and this act of his making no new contract by any request of the owner,

which could in reason change his position, it had plainly, as I thought, only the effect of transferring the flour to the defendants on that day, to be kept as he had kept it, and would otherwise have kept it until the navigation opened, and then to take it to the place to which he was requested to send it. In the meantime the flour is destroyed by an accident, which would equally have happened if Counter had continued to possess the stores, and before it was expected or intended to be put in transitu: at that moment I looked upon the property as merely stored with the defendants as warehouse keepers, and not as carriers. The jury found, according to this direction, for the defendants, and I think the verdict was correct upon the grounds stated.

MCLEAN, J., and HAGEMAN, J., concurred.

Rule discharged.

EASTERN DISTRICT COUNCIL v. HUTCHINS.

The Municipal Council Act, 4 & 5 Vic. c. 10, invests in the municipal council of each district the power of suing on a bond given to the treasurer of the district, for the due payment over to him of the rates received by the collector, and it is sufficient to aver in the declaration that the monies collected are due and payable to the treasurer.

The Eastern District council sues on a bond given on 9th January, 1837, by the defendant to Alexander McLean, Esquire, treasurer of the Eastern District, in 612*l.*, subject to a condition set out in the declaration, that if Hutchins should collect all the rates and assessments of the township of Osnabruck for the then present year, ending 1st Monday in January, 1838, so far as the law might enable him to do, and should pay all the monies which he might so collect, except his own percentage, to the treasurer of the district, on or before the next ensuing sitting of the court of quarter sessions which might be next after the 1st day of March, then the said writing obligatory to be void. And the declaration assigns for breaches: 1st, that Hutchins did not collect all the rates and assessments of the township of Osnabruck, for the year ending the 1st Monday in January, 1838, so far as the law did enable him to do; but, on the contrary, divers large sums of money, in the whole amounting to a large sum, to wit, 200*l.*, remained at the said day appointed for collection thereof, and still remain uncollected, which said sums he, the said Hutchins, might by law have collected, &c. And, for a second breach, that Hutchins, after the making of that bond, viz. on, &c., 10th of January, and on divers other days between that day and the then next ensuing sitting of the court of general quarter sessions, next after the 1st day of March, 1838, as such collector, &c., did collect divers large sums of money, on account of rates for the township of Osnabruck, for the year ending on the 1st Monday in January, 1838, amounting in the whole to a large sum, viz. 600*l.*, over and above his percentage thereon, yet that he did not pay over to the treasurer of the district the said sum of money, on or before the then next ensuing sitting of the court of quarter sessions, which was next after the 1st day of March, 1838; but that at the time of the said sitting of the court of general quarter sessions, to wit, on the 24th April, 1838, a large sum of money, viz. 500*l.*, which had been so collected, remained in the hands of the said Hutchins, due and payable to the said treasurer of the district, and still remains

due and payable, and which the said Hutchins hath converted and disposed of to his own use, &c.; by which breaches the said bond became forfeited, and thereby, since the passing of the act 4 & 5 Victoria, entitled, &c. (c. 10), an action hath accrued to the said plaintiffs to demand and have of the defendant the said sum of 612*l.*, above demanded, &c.; yet that defendant hath not paid the same to the said treasurer before the passing of the said act, or to the said treasurer or plaintiffs, since, &c. Defendant demurs specially to this declaration, objecting that there is a misjoinder of actions; that the district council cannot sue on the bond; that the statute creating the municipal councils is improperly stated to have been passed in 4 & 5 Victoria; that it is not stated that any sum was uncollected beyond the collector's percentage; that the breach, that the collector did not collect all the rates as far as the law enabled him, is bad; that it is uncertain what 1st day of March is intended; and that the monies are stated to be due and payable to the treasurer, and not to the plaintiffs. Joinder in demurrer.

Sherwood, Q. C., counsel for plaintiffs.

Vankoughnet, counsel for defendant.

ROBINSON, C. J.—the words of the 43rd clause of the District Council act are very comprehensive, and I think we are obliged to say, that they do vest this obligation, and the debt under it, in the district council, so that the action is properly brought by them for a debt *due to them* under the statute. There is no ground for the objection about the misjoinder of actions; it was superfluous to say what Hutchins did with the money, so long as he did not pay it over, but it is mere idle surplusage, which does not hurt, as the plaintiff plainly only brings his action for the penalty of the bond. The stating the statute to have been passed in 4 & 5 Victoria is bad (*a*), but it has been held, that the misrecital of the title will not vitiate the declaration (*b*). There is nothing in the objection, that it is not stated that 200*l.*, or any other sum, remained uncollected, over and above the collector's percentage. Hutchins was bound to collect all the rates, and deduct his percentage from them. It is good, I think, to charge, that the defendant did not collect all the rates so far as the law enabled him, in the words of the condition. The reasonable construction of the condition refers to the next 1st day of March, to that next after the expiration of the year for which he was to collect, not next after the date of the bond. The money is due and payable to the treasurer of the district, as the declaration alleges.

MCLEAN, J., and HAGEMAN, J., concurred.

Draft
Judgment for plaintiffs.

THE QUEEN *v.* MADDOCK & CLARKE,

IN RE MANNERS *v.* CLARKE.

Where a verdict was taken in a cause at nisi prius, subject to a reference, and the rule of reference was afterwards made a rule of court, and contained the usual clause against filing any bill in equity, and the defendant against whom the award was made did not make any motion in this court in proper time,

(*a*) 3 N. & M. 475; 9 Dowl. 731.

(*b*) 1 G. & D. 373.

but filed his bill in equity, for which the court granted attachments against him and his solicitor, upon which writs of habeas corpus were subsequently issued—the court refused to entertain a motion to set aside those writs, or suspend proceedings upon them.

Burns moves to set aside the award in this case: 1st—because the award is unjust to the defendant; secondly—the arbitrators committed errors in taking the accounts between the parties, and were guilty of partiality to the plaintiff, and of improper conduct in making the award, as appears by the affidavits filed; or, why the clause in the rule of reference, agreeing that the submission should be made a rule of this court, should not be struck out; and why the writs of attachment issued against the defendant, and against his solicitor, J. F. Maddock, Esq., should not be set aside, and all proceedings upon the writs of habeas corpus issued on the attachments against them, be in the meantime suspended. The award was made on the 2nd of October, 1843, under a submission by rule of reference of the cause only, and a verdict taken by consent, subject to the reference. No motion was ever made in this court against the award, but on the 10th Nov., 1843, the defendant filed a bill in equity to obtain relief against the award, as unjust, and on the ground of improper conduct in the arbitrators, and obtained an injunction against any proceedings to enforce the award in this court, all which was in express violation of his agreement in the submission that he would file no bill in equity. He now files affidavits in support of this motion, which state that he resorted to equity, because he was advised that it was necessary to compel the plaintiff to produce his books, which a court of equity alone could do, and that he was not aware he was guilty of any contempt in thus proceeding. The grounds of objection to the award apply to the merits, with this additional error, that it is sworn, that on going to arbitration it was agreed between him and the plaintiff that a balance of accounts which had been struck between them of 29th June, 1840, shewing a balance in the defendant's favour then of 8*s.* 8*d.*, should be taken as the true state of accounts at that time, and that it was only subsequent accounts that were to be gone into, and one large charge besides, which had not been included in the account, but which the plaintiff had advanced in addition to it, of 8*4l.*, for boarding the defendant's family in the plaintiff's house; that the arbitrators knew these terms had been entered into, but nevertheless went into the whole as an unsettled account from the beginning, allowed the plaintiff the whole of his account, being 10*5l.*, and allowed to the defendant none of his credits, by which that account had been over-balanced by 8*s.* 8*d.*, as appeared by the balance struck in the plaintiff's books. The paper annexed to one of the affidavits, however, shews, that the arbitrators entertained all charges from the beginning, to the full extent urged on both sides, and striking off what were not made out to their satisfaction, found a balance of 15*2l.* 4*s.* in favour of the plaintiff.

ROBINSON, C. J., delivered the judgment of the court. It is not stated that the account in the plaintiff's books, said to have been balanced in 1840, was anything more than the plaintiff's store account, whereas on the arbitration there were large demands urged for timber, &c., which, if just, had nothing to do with that account; and Clarke, on his side, must have advanced charges very much beyond what he could

have claimed as credits against that store account. It is not sworn, that although the parties might have agreed at first to take up the dealings from June, 1840, they might not, in the progress of their discussions, have consented to throw all open: at any rate, the objection that the arbitrators proceeded in disregard of an express understanding, so far as it furnished ground to move against the award, could as easily and effectually have been urged in law as in equity, and whether the arbitrators judged accurately on the merits is no more examinable in one court than in another, and except in gross cases such as tend to establish misconduct or evident mistake, is a matter not investigated in either. When the parties by their submission agreed not to file a bill in equity, it is our plain duty to keep them to that condition, not from any captious feeling of jealousy about interfering with the jurisdiction of this court, but because the parties can each respectively claim at our hands to compel the other to observe the conditions of the reference, considering that this was strictly a reference of the cause alone at nisi prius, in which a verdict had been taken subject to the reference, and that in such cases the parties are clearly held to move against the award within the first four days of the following term, just as if there had been a verdict after a trial against which they desired to move. Considering that five full terms have elapsed since, and a great part of the sixth, without any motion made in this court against the award; considering that the grounds now taken are only such as might have been taken in ordinary practice in this court and taken in due time; that the party's delay has been partly occasioned by a plain violation of the terms of the submission in seeking relief in another court in contempt of the rule obtained with his concurrence; and considering also that the amount awarded is only 152*l.* 4*s.*, and that the case as stated is not a clear one for interfering, even if the application had been made in due time; we cannot properly, I think, grant the rule; but the parties against whom the attachments have been ordered may make any separate applications which they may desire in relation to their present position.

Rule refused.

DOE DEM. STUART v. FORSYTH.

The Eastern side line of lot 24, in the front or first concession of the township of Kingston, cannot be run as it is described in the grant from the crown, or parallel to the Western limit of the township, according to 59 Geo. III. c. 14, because that would carry the concession beyond the line which was originally run out as its eastern boundary.

Ejectment for land claimed as part of lot 24, in the first or front concession of the township of Kingston. At the trial the defence was rested on two grounds:—first, that the land was not part of lot 24; and secondly, that even if it were, the right of the lessor of the plaintiff was barred by the Statute of Limitations. On the first point it was proved by the lessor of the plaintiff, that on 22nd June, 1796, King George the Third granted lot 24 to his father, describing the lot in the letters patent in such a manner as clearly to include the premises in question. It was shewn that the precise situation of the posts planted in the original survey to mark the two front angles of lot 24, was known and was not disputed,

and that the provincial statute, 59 Geo. III. c. 14, sec. 2 (a), makes those angles so marked true and unalterable boundaries, and declares that the lot so marked out shall embrace the whole width between them, and neither more nor less, whether the space shall be found to agree with the distance expressed in the patent or not, and therefore that the lines to be run from these angles to the second concession line must be the limits or side lines of the lots; and the only question was, as to the side line on the *East*, and it was proved that whether this line was run out according to 59 Geo. III. c. 14, or the description in the patent was to be the guide, in either case the land would belong to lot 24, and so be a part of the property of the ancestor of the lessor of the plaintiff. On the part of the defendant it was contended, that the statute referred to did not apply; that sections 3 & 4 (b) were applicable only in those cases, where, in the original survey as run out upon the ground, the lots whose boundaries are in question are intended to be made similar in figure, and to range with the side lines of the township from which the lots were numbered; that the intention of the statute in such cases was to make the actual course of the side line, as traced out upon the ground, and not its expressed course, the standard to which all lines must conform, thus producing an uniformity of direction, when that was intended, even by establishing and adopting as a standard an actual line which may have been erroneously run, which, however, he contended was not the case

(a) Section 2 enacts, that all boundary lines of townships, all concession lines, governing points, and all boundaries, posts or monuments, which have been placed or planted at the front angles of any lots or parcels of land, in the first survey, intended to determine the width of such lots or parcels of land, provided such survey has been performed under the authority of the executive government of the late province of Quebec, or under the authority of the executive government of this province, shall be, and the same are hereby declared to be, the true and unalterable boundaries of all and every of such townships, concessions and lots, respectively; and that every lot or parcel of land respectively, whether it shall upon admeasurement be found to contain the exact width, or more or less than what may be expressed in any letters patent, grant or other instrument, in respect of such boundaries or lines, mentioned and expressed, shall embrace the whole width contained between the front posts, monuments or boundaries, planted or placed at the front angles of any such lot or parcel of land, as aforesaid, in such original survey as aforesaid, and no more nor less, and every half or quarter of such lot or parcel, its proportion, any thing in such patent or instrument to the contrary thereof in anywise notwithstanding.

(b) By sec. 3, the boundary line of each and every township, on that side from which the lots are numbered, shall be, and the same is hereby declared to be, the course or courses of the respective division or side lines throughout the several townships and concessions of this province respectively; and all surveyors shall and are hereby required, to run all division or side lines, which they may be called upon by the owner or owners of any lands to survey, to correspond with, and be parallel to, the respective town lines, from whence the lots are numbered as aforesaid.—Sec. 4. Every licensed surveyor, when and as often as he is employed, to run any side line or limit, between lots or lines, required to go the same course of the side lines or limits, between lots in the concession, in which the land to be surveyed lies, shall, if it has not been done before; or if it has been done but the course cannot at such time be truly ascertained, determine by a true meridian line, or some other infallible method, the true course of a straight line between the front and rear angles of such concession, on that boundary of the township from which the lots are numbered, and run such line or lines, as aforesaid, truly parallel to such course, which is hereby declared, and shall at all times be deemed and taken to be, the true course of such lines in the several townships of this province.

with the *Eastern* side line here, and he proved by several witnesses, that the surveyor, who made the original survey under the authority of government, did not run or intend to run the eastern side line of 24 in a course parallel to the western side line of the township, but on the contrary, laid down the eastern side line of the township itself, which contains one lot beyond 24, in such a direction, that if the eastern side line of 24 were to be run on the same course on the western limit of the township, it would cross it, and run out of the township of Kingston altogether, as laid out upon the ground in the original survey. The statute therefore could not assist, and for the same reasons the defendant contended that the patent was not available to carry the eastern boundary beyond that line, which, in the original survey was laid out upon the ground as the eastern boundary of the township of Kingston, on account of the second clause in the statute, which enacts that all boundary lines of townships according to their original survey, shall be the true and unalterable boundary of any such township. The defendant proved that Mr. Collins, the deputy surveyor-general, laid out the township of Kingston by special instructions from the government, in or about the year 1783, intending to lay out a tract of six miles square, fronting upon the bay or waters of Lake Ontario, making the several concessions contain each twenty-five lots of two hundred acres each, but by some error committed in running out the first concession, by which he gave to one of the lots the breadth of a lot and a half, he did not come out right at the east end of the concession, and he could not have given to lot 25, which was the last lot in the concession, the full width of a lot throughout, without confining the town plot of Kingston, which lies between lot 25 and the water, within much too narrow limits. Whether the discovery of this error induced him to alter his designs, or whether the attraction of the needle, which is great in that place, or some other circumstance led him to trace on the ground the Eastern side line of lot 25, which formed in fact the exterior side line of the township of Kingston, as then laid out by him, it is very certain that he ran out that line in a direction so much inclining to the westward instead of due north, which was the course of the other lines, that it intersected the western side of lot 25 near the middle of the first concession, making lot 25 a triangular, instead of a rectangular, tract. This line run by Collins was clearly proved by several witnesses. The proprietor of lot 25, a Capt. Grass, having discovered that he had not a sufficient quantity of land, complained to the government, and Mr. Collins was called on for explanation, and he having traced his original line, declared that any alteration would destroy the town plot, and at his suggestion a compromise was made between the government and Captain Grass, that the latter should receive compensation for his deficiency in other lands, that his line as run in the original survey should constitute the eastern boundary of the township along the end of the first concession up to the point referred to, and that from thence a new departure should be taken, and another line run by authority of the government inclining less to the west, which it was thought would still leave sufficient ground for the town plot. This was accordingly done, and a new line was run by one Tuffy, a surveyor, from that point northerly, which is commonly called Tuffy's line. Public correspondence, and documents which were produced from the surveyor-

general's office, and the testimony of witnesses who spoke from their own knowledge of the facts, and not from rumour, placed these proceedings of the government beyond a doubt, and the effect of them was to make Collins's line on the east side of 25, the township line, up to the point where Tuffy's commences, and from thence Tuffy's line bounds the east end of the third concession. This was nothing but a correction made in the original survey before it was finally adopted and accepted by the government, and the two lines together must be regarded as forming the eastern boundary according to the original survey, and as such confirmed by the statute 59 Geo. III. ch. 14. sec. 2. It was further proved, that patents were afterwards granted for lands in this concession of the township, and the inattention or want of accuracy of the surveyor employed by the surveyor-general's department has caused the difficulty, for his diagrams returned to the office, and the descriptions made out by the surveyor-general, and the patents issued upon them by the government in and after the year 1796, which was many years after the survey made upon the ground, are not consistent with the survey itself as it was actually made, and as it was knowingly and deliberately considered and confirmed by the government. The jury, under the direction of the Chief Justice, who presided at the trial, found for the defendant, and *Draper, Q. C.*, obtained a rule nisi for a new trial, on the ground that the verdict was contrary to law and evidence, and for misdirection.

Boulton, Q. C., shewed cause.

ROBINSON, C. J.—I continue to be of the same opinion that I was at the trial, that the verdict was rightly rendered for the defendant on the question of boundary. It is not important in this case to consider whether a line altered, as this one was, by authority of the government, after it had been run out, can be treated as part of the original survey, for the fact is, that the land in dispute in this action lies nearer the front of the concession, for which Collins's original line was still to stand as the eastern boundary, so that in the strictest sense of the word, the line upon which the defendant in this case relies, is the line actually run on the ground in the original survey made under the direction of the government, and it has indeed this additional and unusual stamp of public authority, that the attention of the government having been called at the time to its actual position or direction, it was by their order retraced, and deliberately fixed and retained. There is indeed no room for question, except what has been created by the forgetfulness or inattention of those officers of the public departments who had afterwards to prepare patents for lands in this concession of the township. This inconsistency has given occasion to the proprietors of lots 24 and 25, to urge claims which on the face of their patents are just and legal, which nevertheless cannot be conceded by courts of justice without violating the provisions of acts of parliament. If when the government were issuing their patents to the respective grantees of lots 24 and 25, they had looked back to what had been previously done by their agents under authority, and evidenced by actual traces upon the ground, they would have found that they had not two hundred acres to grant to Dr. Stuart as the intended grantee of 24, nor one hundred acres to give to Capt. Grass as the intended grantee of lot 25, because they had so bounded the first concession to the east, as not to have the quantity of land required for those grants. If the patents had

been made to correspond with the surveys on the ground, the apparent hardship would have been avoided; of denying to a man the full effect of his grant, while he can urge, as can be truly done here, that the king did at the time own all the land which he professed to grant, and therefore could do what in fact he did. But as it is we are compelled to say, that although the king could grant and did grant to the ancestor of this lessee of the plaintiff a lot of land so described as to embrace the tract which he now claims, yet that we cannot hold the patent to cover it, for these reasons, that it professes only to grant a certain lot 24 in a certain concession of a township, but it cannot go out of that concession, because an act of parliament has expressly provided, that all concession lines, and township boundaries then existing shall be unalterable boundaries, that is, boundaries that cannot be passed. The plaintiff's patent for land in the first concession cannot take him out of that concession; and that concession cannot extend in any direction beyond the line which in the original survey made by order of the government was laid out upon the ground as its boundary, as Collins' line in this case was clearly proved to be. And indeed, if sitting in a court of law, we were at liberty to consider the hardship of a case, with a view of allowing such considerations to prevail against the close enactments of a statute, we could not shut our eyes to the hardships which a contrary decision would lead to on the other side, for while the proprietors of lots 24 and 25 have for fifty years and more, limited their occupation by the lines of Collin's survey, the government has been making grants by subsequent patents to various other persons of lands on the east of the line run by Collins and Tuffy, and confirmed by the government, and coming fully up to that line. These grants, though they are inconsistent with their earlier patents, to Dr. Stuart and Captain Grass, are consistent with what their surveyors had marked down upon the ground under their authority, and it is that latter fact which our statute law says must govern, and not the courses and distances or quantity of land described in the patent, which it is well known are in very many instances erroneous. The persons receiving these latter grants, or purchasers from them, have laid out streets and built houses, and made expensive improvements within the last twenty or thirty years, upon lands which the crown has granted by various names, as block R., and block G. The grantees of the lots 24 and 25, and their descendants or assignees, have seen these things going on, and now, when a town has actually sprung up under these acts of the government, the proprietors of 24 and 25, in this and other actions which have been before us, come down upon the occupants of these lands lying to the east of Collins' and Tuffy's line, and say "the lands, which in 1803 or 1804 the crown granted as part of block R. or block G., are included within the description contained in our patent for lot 24 or 25 in the first concession of Kingston, and therefore you must now resign to us what for so many years we have seen you treating as your own, and what we have always known you had the public sanction of government for supposing to be your own." If the legal right was with the lessor of the plaintiff in this case, and if there was no legal difficulty in the way of his asserting it, then of course he would be entitled to recover in this court, and the defendants would be left to turn to the government, and solicit redress in some form for the injury they would have to suffer in consequence of the contradictory acts

of the land-granting departments. But as the law is, we think it clear that the plaintiff cannot recover, and whatever equitable claim to recompense his failure may give to him, he can only for that be referred to the government. When the jury upon the charge that was given to them found in favour of the defendant, as they have done, upon the question of boundary, they must be taken to have found that those facts existed upon which the defence was in that respect founded; they have determined therefore, that the eastern side line of lot 24 cannot be run parallel to the western limit of the township, as the act directs, because that would carry the concession beyond the line which they were satisfied was originally run out as its eastern boundary. The only question that can remain is, whether the evidence warranted them in so finding. It appeared to me at the trial that it did, and my brothers, having examined it, are also of that opinion. The conclusion which we now come to is in accordance with the opinions which we have had occasion to express in other cases depending on these same boundaries, and we should be increasing the confusion and inconsistency which has unfortunately been created, if we were in this case to hold what would be so repugnant to sense and reason, as that the limits of lot 24 could be so extended to the eastward as to embrace land beyond the line which has been established as the limit of lot 25, but that effect would follow from a decision which would confirm the claim of the lessor of the plaintiff to have his eastern side line run parallel to the western limit of the township. One point was raised in the argument which requires to be noticed, though it is only a further proof of that undecided or varying conduct of the land-granting departments, which has given rise to these questions. It is clear, that the government in 1783 and 4, designed Collins's line, continued by Tuffy, to be the limit between the township and the town, for Mr. Collins gives as a reason that less space than that line would leave, would not be sufficient for the town plot. Even at this early day, and long before this, it has become plain that he was right, for the town has in fact already extended far beyond that limit. But still the government seem to have changed their mind, and some years after that division line was laid down, they made grants of lands to individuals which lie between that line and the old town plot, and in the patents for these lands they are described as being in the township of Kingston. This has suggested the argument that Collins's line can no longer be regarded as a township boundary, and therefore is not within the statute which makes township boundaries unalterable, and cannot present an obstacle to the lines of 24 being run according to the patent or according to the 3rd and 4th clauses of the stat. 59 Geo. 3, c. 14. But this is clearly not an argument that can avail. We must look upon these subsequent grants as additions made to the township originally run out, and such additions have been made to townships in various other cases. The regular original diagram of the township of Kingston, as run out in 1783, still exists, and its distinguishing boundaries are not destroyed by these additions being made to it. It was never pretended or attempted to make these additions parts of the first concession as laid down in that survey and bounded on the east by Collins's line, and it is only in that concession that the lessor of the plaintiff can claim to hold under the patent on which he relies.

Rule discharged.

MITTLEBERGER ET AL. v. MERRITT ET AL.

Where an agreement was entered into, under seal, between A., B., and C., for the advance of certain monies by A. to B. and C., who were partners in a mill business, and who, from the assets arising from that business, were to repay such advances, and D. afterwards became a partner with B. and C.: Held—that A. could not maintain an action of assumpsit against B., C. and D. jointly for the recovery of the balance of such advances.

Assumpsit on the common counts. Pleas, 1st—general issue; 2nd—that by an arrangement between the plaintiffs, Messrs. Tobin and Murison and the defendants, it was agreed that the plaintiffs should accept Tobin and Murison as their debtors on this demand, and should discharge the defendant; that they had received credit accordingly for the amount from Tobin and Murison, to whom they were indebted. It appears by the evidence, that the two plaintiffs, Mittleberger and Benham, by an instrument under seal, dated 28th August, 1839, leased from the defendants, Merritt and Adams, certain mills and other premises, for three years from the 15th July preceding. The instrument, which is long and special, containing many stipulations, seems to treat Merritt and Adams as the proprietors of the mills, that is as having the whole interest in them, though the demise is not in the usual terms, "of the mills themselves," but "of all their right and title in the mills." It appears that in point of fact, Scott, the other defendant, had, before the making of that agreement, agreed, or at least bargained, for a small interest or share in the mills, in recompense for work done by him as millwright, and that he was, or commonly had been known and spoken of as a part owner or partner. What was his precise position at the time of this agreement being entered into between Mittleberger and Benham on the one side, and Merritt and Adams on the other, did not appear; or whether any or what agreement had been made between him and Merritt and Adams at any time, in regard to the business which had been conducted at the mill before the leasing of it to these plaintiffs, or in regard to the debts and credits arising out of such business, as they may have stood at the time of the lease being made. Among the stipulations in the lease, to which Scott is not a party, it is agreed by Merritt and Adams that Mittleberger might collect all the debts mentioned in a schedule annexed, and which debts were stated to be owing by a number of persons to the mill company; that he should enter them, when collected, in the books of Mittleberger & Co., to the credit of Merritt and Adams, and was to be at liberty to apply the monies so collected in carrying on the business of Mittleberger & Co., at the mills, in the profits of which business Merritt and Adams were, under certain restrictions, to participate. And Mittleberger, on his part, covenants in the following words:—"And the said John Mittleberger doth further covenant and agree, that he will diligently, and with as little delay as possible, collect in and receive the debts, notes, bonds, accounts, and claims owing to the said William Hamilton Merritt and George Adams, at the said Mill, or otherwise connected therewith, and shall and will, out of any such monies, receive, pay off, and discharge all debts now due, and to become due, against the said mill and premises, to be sanctioned by the said William Hamilton Merritt and George Adams, or

either of them, without unnecessary delay, and credit the monies received, and charge those paid out, to the account of the said William Hamilton Merritt and George Adams." In another part of the agreement, Mittleberger covenants, "that, at the expiration of the partnership of Mittleberger & Co., he will close up the business of the firm, and first pay and discharge all its liabilities, and that immediately after such determination he will pay over to the said Merritt and Adams, their executors, &c., and to each of them, their investments of cash or stock in the said new firm, whatever amount may be coming to them or either of them, according to the schedules thereto annexed, or subsequent receipts and credits, provided the same have been realised and paid at that period, or as soon as the same shall be realised, without negligence or delay on the part of the said John Mittleberger, and deliver over the claims not collected; and shall, within three months, pay over to the said W. H. Merritt and George Adams, whatever balance of account for rent or otherwise may be coming to them, or either of them, from the said firm." The objections taken by the defendants were, that the plaintiffs and the defendants were partners in the transaction out of which the alleged claim arises, and so that the one cannot maintain an action at law against the other, on such a demand; 2nd—that the evidence shewed that there was no right of action against Scott, who was therefore improperly joined as a defendant, which misjoinder disabled the plaintiffs, in a matter of alleged contract, from recovering against the other defendants; 3rd—that the cause of action, if any, accrued under a sealed instrument, which should have been sued upon; and 4th—that the terms of that instrument shewed that Scott was not liable to be charged upon the cause of action alleged. The jury, in accordance with the direction of the learned judge, found a verdict for the defendant on the general issue, and for the plaintiff on the special plea.

Burns and Blake, counsel for plaintiffs, obtained a rule nisi for a new trial for misdirection.

Boulton, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court. It is impossible, I think, to read these stipulations in the sealed agreement, without coming readily to the conclusion, that whatever sums of money should be paid by Mittleberger, in accordance with them, cannot be treated as monies paid by Mittleberger and Benham for Merritt, Adams and Scott, but must be monies paid by Mittleberger, according to his covenant, for Merritt and Adams, and must be charged against them, and them only. The only ground on which it could be contended for a moment that an action of assumpsit can lie for such monies against these three defendants, as for monies paid to their use, is that on which Mr. Blake did rest his argument, and which it appeared to me to require to be carefully considered, namely, that the amount of debts paid for the mill and premises, that is of debts due on account of the mill business after the lease made to these plaintiffs, much exceeded the amount of debts due to the mill which Mittleberger had received; and that as the covenant only bound Mittleberger to pay the debts due by the party, out of the debts which he should receive for them, his claim to be repaid the amount of monies advanced cannot be said to rest on the agreement, because those would be advances made beyond, and not in consequence of the agreement, and consequently for the benefit and upon the liability of those for whom, in fact, such advances were made. The argument was forcibly put, and the distinction intended to be taken

is very intelligible, but it rests upon the assumption, however, that Scott was found to be a partner with Merritt and Adams, and liable for the debts contracted in the course of the mill business; that these monies were advanced by the plaintiffs, not under the agreement, but as any such advances might have been made by any other party, and that they were made either by Scott's request, or with his knowledge and sanction, or at the request of his partners, which would equally make him liable. Having examined the evidence given at the trial, I am of opinion that it does not make out such a case. In the first place, it did not appear that Scott was a partner; he might have been owner in a small share in the mill, without being a partner in the business carried on there. For all that appears, he might have been compensated by the other two for his interest in the shape of rent or otherwise, without, however, any claim to the share in the profits, and without being liable for the losses, in which case he would not be a partner. How he stood in regard to the business that had been carried on in the mills, and out of which the debts arose, was not shewn upon the trial. The case is much stronger upon the documents and evidence, to establish a partnership between the plaintiffs and the other defendants, under the agreement of August, 1839, then to shew a partnership between Scott and these two defendants. But if it were reasonable to look on the advances as not made with reference to the agreement, at least as respects such portion of them as exceeds the debts received by Mittleberger, still to make Scott liable for such portion, under the common counts, as being a partner with Merritt and Adams, it would be necessary, besides proving the partnership, to shew, that either by Scott or his partner, the plaintiffs were requested to make such advances. I see no such evidence. The special agreement negatives any such authority, so far as it goes. And it is not supplied by shewing, that the accounts of advances, which the plaintiffs kept or rendered, were from time to time shewn to Scott, and examined by him. He seems to have been conversant with the business formerly carried on there, and may have been able, in such capacity, to check the accounts from his knowledge of the circumstances. We do not know for what purpose, and with what view he may have had the accounts before him; but too narrow a construction, I think, is attempted to be placed upon the agreement by the plaintiffs. Mittleberger alone covenanted with Merritt and Adams that he would collect all the old mill debts, so far as he could, and that he would, out of these monies, pay all such debts due on account of the mills (that is, due before he took them) as Merritt and Adams should sanction. By another part of the agreement which preceded this, he was to be allowed to invest such stock, debts, &c., as he should realize on account of the old concern, in the new business to be carried on by him and Benham, for the joint benefit (as it is evident from the agreement, though in a qualified way) of those two, and of Merritt and Adams; but it was natural for the latter to stipulate, because it was but just to their creditors, and safe for themselves, that he should not embark these assets of theirs in the new concern, which he and Benham were to manage, and leave the old debts unpaid; they therefore made it a condition, that out of the debts collected for them, he should pay the debts due by them, or, in other words, that he should invest nothing in the old concern but the surplus; but this stipulation, that out of the debts

collected he should pay the debts due, does not extend to restrain the following words in the covenant, namely, "that he will charge the monies paid out to Merritt and Adams" so as to make it apply only to such portions of the advances as he should be paid out of monies collected by him : the covenant means, in my opinion, that he should charge all the monies, paid on account of the mill, against those two. And, besides, Mittleberger was only to pay such debts as Merritt and Adams should sanction. It cannot be contended, that because these plaintiffs, or Mittleberger alone, may have paid off debts due on account of the mill, exceeding 6000*l.* beyond what they received, that therefore an action will lie against Scott, though he is no party to the agreement, though it is not shewn that he authorised any advance, or that he was in fact a partner ; and if he were a partner, still, under the terms of this agreement, in my opinion, the advances must be charged against Merritt and Adams alone, for to seek to make Scott also liable for them, is contrary to Mittleberger's covenant under seal ; and, indeed, what right Benham had to sue at all is not clear. Admitting Scott to have been more than merely a part owner of the mill, and to have been a partner in the former business, it would still have been competent to the other two (Merritt and Adams) to agree as they have done with Mittleberger, that he should pay debts due on account of the mill, and charge such payments to them. Such an arrangement might have been perfectly reasonable and legal, for if they were partners with Scott they might have closed all accounts with him for what might have been due him on account of his small interest in the concern, and might have acquired the sole interest in the assets of the firm, and engaged to pay all its debts. If they merely contemplated such an arrangement, and for that or any other reason did make such an agreement with Mittleberger, it is binding on both parties ; he might regularly sue them alone on such an agreement, and could not sue the other. The cases of *Beckham v. Knight* (*a*), and of *Thomas v. Shillebeer* (*b*), which were cited in the argument, support the principle fully, that an express contract by two or more members of a firm, may make them liable alone to a third party, to the exclusion of a partner not named in the agreement. Upon these grounds, I am of opinion, that the verdict was properly rendered for the defendants, on the ground that the evidence did not make out a case on which to charge Scott upon his claim for 6000*l.*, advanced, as I consider it, upon and in consequence of this covenant between one of these plaintiffs and Merritt and Adams, and which entitled Mittleberger to look for repayment only to them, and not to Scott. To have allowed a verdict to pass against Scott for these advances, which would have made him liable for the whole, or for any part of it, might, and I doubt not *would* have worked the most flagrant injustice, and it would have been throwing the liability on a quarter clearly not intended by any of the parties ; and I must not omit saying, that it appears to me upon the whole agreement very doubtful, whether, even against Merritt and Adams, an action at law would lie for the advances, in the present condition of the affairs of this mill company, and whether any amount due by them, to either or both of these plaintiffs, must not be left to be deduced from a final settlement of the operations

of the three years' business, under the complicated conditions upon which it was to be carried on, and the proceeds accounted for and divided. Mittleberger might, if he pleased, within a few days after he had executed this agreement, have advanced ten or fifteen thousand pounds in relieving the mill from the incumbrance of old debts, trusting to his being able to collect enough afterwards to make him safe in this advance; and could it be said, that his choosing to take upon himself the risk of doing this, should give him the right to charge the defendant Scott with an account which he had never authorised him to pay, or contemplated his paying, and which might hurry him to utter ruin, and that he should be allowed to charge him in an action at law, as if it had been money advanced by him under ordinary circumstances, and to recover without shewing how the balance stood at the end of the three years, upon a final adjustment among the parties to this very special agreement, when it is quite clear that all monies collected and paid, have to become items in a general account between the parties to that agreement, and were to lead to a division of profits, or a common liability to loss, according to the result of the whole.

The learned Judge at the trial held, that under the agreement of 28th August, 1839, it was plain that Scott was not liable for any monies advanced by Mittleberger; that the assets of the proprietors of the mill, received by him, and to be credited against those advances, were the assets of Merritt and Adams, and not of Scott, and were so treated and admitted in the agreement, and therefore that the balance which might turn out to be due between the advances and receipts, was not one on which an action could be sustained against these three defendants. I think that view of the subject was substantially correct, and that this rule must be discharged.

MCLEAN, J., and HAGEMAN J., concurred.

Rule discharged.

PRACTICE COURT.

HILARY VACATION, 8 VICTORIA.

Before MR. JUSTICE MCLEAN.

MAHON v. ERMATINGER.

A Member of the Assembly is entitled to the privilege of being sued by bill and summons from the moment of his election; and a writ of ca. re. issued against him on the day of his election is irregular.

Crawford obtained a rule nisi to set aside the writ of ca. re. issued in this cause and the service thereof, on the ground that the defendant was

entitled to privilege as a Member of the House of Assembly, and should have been sued by bill and summons. The writ was issued on the 26th of October last, and on the same day the defendant was elected a Member of the House of Assembly for the County of Middlesex. The copy was served on the first of November.

Burns shewed cause.

MCLEAN, J.—The law does not recognize any fraction of a day, and the defendant must be regarded as a member during the whole of the 26th October, and consequently entitled during the whole of that day to be sued by bill and summons; the proceedings are therefore irregular, and the rule must be made absolute.

Rule absolute.

THAYER v. HENSLEY.

It is not sufficient to state in the jurat of an affidavit to arrest since the passing of 7 Vict. ch. 31, that the affidavit was read over and explained to the deponent by the Commissioner antecedent to the swearing thereof, without stating that it was *duly* read over, &c.

This was an application to set aside a bailable writ and arrest on several grounds; but the principal one was, that the affidavit to hold to bail was made since the passing of 7 Vict. ch. 31, and omitted to state in the jurat that the affidavit was *duly* read over and explained to the deponent by the commissioner before it was sworn.

Foster, in support of the rule.

Crawford showed cause.

MCLEAN, J.—The third clause of the act referred to, declares that it shall not be lawful for any process to issue against a defendant upon any affidavit, unless the whole affidavit be read over and explained to the plaintiff or person making the same, and unless it be stated *in words at full length*, in the jurat of such affidavit, that the same affidavit was *duly* read over and explained to the deponent by the commissioner or party before whom it is sworn, antecedent to the swearing thereof. The Legislature have been very particular in requiring that certain words at full length shall be inserted in the jurat, in order that it may appear on the face of every affidavit that the deponent was fully aware of its contents; and in this affidavit the directions of the statute have not been complied with. The jurat states only that it was read over and explained to the deponent, not that it was *duly* read over and explained, and from the apparent anxiety of the legislature that it shall so appear in the jurat, "in words at full length," I must suppose that some importance was attached to the form of expression, and any omission in any respect varying the sense, must therefore be fatal. By the insertion of the word *duly*, I must presume that the legislature intended that all such affidavits should appear to have been read over *with care* to the deponent, and not in a hasty or unsatisfactory manner, so that the party could not have a fair opportunity of knowing the contents, and as that degree of care cannot be inferred in this case, I am of opinion, that the affidavit to hold to bail is in this respect, defective, and that the writ and all subsequent proceedings, must be set aside, on the defendant's entering common bail, and on condition that no action shall be brought.

Rule absolute accordingly.

BROWN v. SIMMONS.

A defendant in an action of replevin cannot move for judgment as in case of a nonsuit.

Eccles obtained a rule nisi for judgment, as in case of a non-suit, for not proceeding to trial pursuant to notice.

Crooks showed cause, and having shown that this was an action of replevin, contended that no rule for judgment, as in case of a non-suit, could be given; he also resisted the motion on other grounds.

MCLEAN, J.—No motion for judgment as in case of a nonsuit can be entertained in replevin, the Statute 14 Geo. 2, ch. 17, not extending to such cases. In the case of *Bentley v. Scott*, (a) the court said that the statute applied as well to cases of replevin, as to other cases in which non-suits could be granted for not proceeding to trial pursuant to notice, but in the cases of *Jones v. Concannon* (b), and *Shortridge v. Hiern* (c), it was adjudged that the defendant in replevin, being in fact in the position of the plaintiff in ordinary cases, and interested in bringing the cause to trial, and entitled to do so by proviso, cannot make such a motion. On the authority of these cases the rule must be discharged.

Rule discharged.

ENGLISH v. EVERITT.

Where after arrest on bailable process issued from a District Court, the proceedings were removed into the Court of Queen's Bench, by writ of habeas corpus, and a motion there made to set aside the writ and arrest for a manifest defect in the affidavit of debt, the rule was made absolute, though it was shewn in the return to the writ, that a similar motion was pending in the court below, on which no judgment had been given.

The defendant in this cause was arrested on a writ issued from the Bathurst District Court, on an affidavit of debt, which was clearly defective, and the proceedings had been removed by writ of habeas corpus into this court, by the return to which it appeared that a motion had been made in the inferior court to set aside the proceedings on account of the defects in the affidavit, which motion was still pending, no judgment having been pronounced upon it.

Baldwin obtained a rule nisi, to set aside the writ and arrest, and discharge the defendant from custody.

Eccles shewed cause.

MCLEAN, J.—It was quite competent for the Judge of the Bathurst District Court to have set aside this writ and arrest; but as he shows that no judgment has been given, and the matter is now before this court on his return to the writ of habeas corpus, and it manifestly appears that the defendant is in custody on a writ issued on a defective affidavit, he is undoubtedly entitled to be discharged. The writ and arrest at the suit of the plaintiff, must therefore be set aside, and the defendant discharged from custody on entering common bail in the suit.

Rule absolute.

FARR v. ARDERLY.

Where there were several executions against the goods of a debtor, and there was a defect in the proceedings of the execution creditor, who was entitled to priority, which might have been sufficient to have set them aside on the motion of the debtor, the Court refused to set them aside on the application of the subsequent execution creditors, made for the purpose of obtaining priority for their writs of execution, without the knowledge or consent of the debtor.

Vankoughnet obtained a rule nisi to set aside the judgment and all proceedings thereon, for irregularity, for want of an appearance for the defendant, and declaration or incipiter of declaration against him. The application was made on behalf of third parties, creditors of the defendant, with a view of obtaining precedence for their executions over the plaintiff's execution, should the judgment and proceedings be set aside. It was not alleged that there was any fraud or collusion between the plaintiff and defendant, nor was any consent of the defendant shown for the motion being made on his behalf.

A. Wilson showed cause.

MCLEAN, J.—There is no doubt a defendant must be brought into court in some way before judgment can be signed against him; and if he does not appear himself, the plaintiff is bound to appear for him, before he can proceed, and as there is no appearance in this case, the judgment is liable to be set aside, if an application of this kind can be entertained in favor of parties, who are strangers to the judgment, and who seek to advance their own interest at the expense of the plaintiff, the defendant not being a party to the complaint of irregularity, and not moving in the matter. The case of *Jones v. Jones*, (a), is a very strong authority against this application. In that case judgment was entered on a warrant of attorney, more than a year and a day old, without leave of the court, which was clearly irregular. The party applying was, as here, a subsequent execution creditor, and the court said, "that however available the objection might be if urged at the instance of the defendant himself, it could not be pressed by a third party, a stranger to the proceedings, as a ground of irregularity, and therefore the rule was refused." There is, I think, great weight in the objection made by the plaintiff's counsel, that as the defendant is not applying to set aside the judgment, no terms can be imposed on him in his absence, as to bringing no action for the levy on his property under this judgment. If the judgment were now set aside, it would have the effect of conferring on the defendant a right of action which he does not ask for, and from which he could not properly be debarred, while he is not before the court. I have not been able to find any authority in support of a motion like this, in the absence of fraud, nor has any such been shown to me; and therefore in the absence of such authority, and with the strong case of *Jones v. Jones* against the application, the rule must be discharged.

Rule discharged.

(a) 1 D. & R. 558.

THOMPSON v. ZWICK.

Where after action brought, a confession of judgment was prepared by the plaintiff's attorney, and sent to the plaintiff at his request, with a blank for the sum for which the confession was to be given, and the sum was filled in by the plaintiff, and the confession executed by the defendant, without the attorney or any of his clerks being present, it was held that the rule of court, Easter Term, 9 Geo. 4, requiring the intervention of a practising attorney for the taking of a confession of judgment, was sufficiently complied with. Any irregularity, which is complained of, as a ground for setting aside a proceeding, must be specifically pointed out in the rule, or so clearly referred to, as contained in the affidavits filed, as not to be mistaken.

James Boulton obtained a rule nisi last term to set aside the cognovit judgment and executions in this cause, and all subsequent proceedings, as fraudulent, defective, and irregular, the cognovit not having been in fact taken through the intervention of an attorney, the defendant being misled by the person who induced him to sign it, the jurat in the affidavit having an erasure in it, and an obliteration thereon, and one figure written over another, with costs. It was shewn by the affidavit of the defendant, that he was called upon by a clerk of the plaintiff, of the name of Brown, who demanded payment of a debt due by one Rosell Raiment, for which he had made himself liable; that on that occasion the defendant said he would *enquire about it*; that afterwards another clerk of the plaintiff, one Nicholson, called upon him and required him to sign a *bond* for the amount, which he did, rather than *litigate* the matter; that he was much surprised to find, that instead of a *bond* he had signed a *confession* of judgment, and that it was not understood by him, and he never would have signed the confession had he so understood it; that Nicholson, the clerk of the plaintiff, was the only person present when it was signed. There was also an affidavit of Mr. Boulton, by which it appeared that the cognovit, with the exception of the amount and date, was in the handwriting of Mr. Boomer, partner of plaintiff's attorney, and that the amount and date were filled up by Nicholson, who witnessed the execution of the cognovit; that the affidavit of the execution of the cognovit was sworn before one Richard Brown, formerly a clerk, but then a partner of the plaintiff. A copy of the original *fi. fa.* attached to this affidavit shewed that the *fi. fa.* had been issued on the 6th February, 1844.

Burns shewed cause, and filed the plaintiff's affidavit, shewing the nature of his demand, and stating that the defendant had frequently promised payment of the amount; that about the 10th February, 1844, after the confession was given, he was called upon by Mr. Boulton, who, as counsel for the defendant, applied to set aside the confession, as having been fraudulently obtained, requesting further time for the defendant to pay the amount, he having, as Mr. Boulton alleged, placed claims in his hands for collection, the proceeds of which were to be paid on this judgment. The plaintiff further stated, that in consequence of Mr. Boulton's application, he wrote to Messrs. Miller and Boomer to grant further time; that a letter was attached to Mr. Boomer's affidavit, sworn by Mr. Boomer to have been received from the plaintiff, authorising delay on the execution. And the plaintiff further stated, that after the cognovit was given, the defendant requested that no further costs might be incurred, as it was his intention to pay up the amount. By the affidavit

of William Nicholson it appeared, that the defendant, after having been served with process, came to the plaintiff and gave him claims against other persons, by which the amount was reduced to about 48*l.* 10*s.*, and for the balance the defendant executed a cognovit, which was read over to him and explained, and not represented to be merely a bond. This affidavit also stated, that the defendant fully understood that if the debt were not paid in the time mentioned in the cognovit, an execution could issue against him. An instrument was attached to this affidavit, taken after service of process, expressly to prevent the defendant from taking advantage of the Statute of Limitations. Mr. Boomer's affidavit shewed, that a suit had been instituted by the plaintiff against the defendant on two promissory notes, which were attached to the affidavit, and which were sworn by Nicholson to have been produced to the defendant, and acknowledged by him, before the cognovit was given; that common bail and declaration were filed in the suit, and that the cognovit was prepared in the suit, and transmitted, in consequence of hearing from the plaintiff that the defendant wished to acknowledge the debt, and with a view of saving the defendant the costs and trouble of a journey to Niagara to execute it there. By the affidavit of Henry Long, sheriff's bailiff, it appeared, that the defendant, about the middle of June last, paid 13*l.* 10*s.* on the execution, without alleging to the bailiff any objection to the execution, or the correctness of the plaintiff's demand.

MCLEAN, J.—The affidavit of the defendant is utterly irreconcileable with the affidavit filed by the plaintiff. The defendant states his embarrassment when a demand was made upon him by Brown in behalf of the plaintiff, and alleges that he became alarmed by Brown's representations, "although he did not owe the plaintiff anything." On the other hand, the plaintiff produces two notes of hand, which are signed by the defendant, and which he acknowledged to the plaintiff, in the presence of Nicholson, as still due, alleging only his inability to pay the amount. Again, when sued he paid up a part of the amount, and gave his *confession rather than litigate* the amount. It appears by the defendant's affidavit, that he was willing to give a *bond* for a sum which he alleges he did not owe, but not willing to give a confession. Now, it seems incredible, that after the amount had previously been admitted to be due by the defendant, in writing, and after a suit had been instituted, any attempt should be made to deceive the defendant by representing the confession to be a bond. But the affidavit of Nicholson completely meets and contradicts the statement of the defendant, as to the fraud said to have been practised on him in obtaining the cognovit, and disposes fully of that ground of objection to the cognovit. The next ground is, that it is defective and irregular, not having been in fact taken through the intervention of an attorney. This objection is met by Mr. Boomer's affidavit, which shews that the cognovit was prepared by him, and sent up to the plaintiff to have it executed, with a statement of the amount apparently due, and that the cognovit was signed for less than that amount. Now if the cognovit had been filled up with the amount stated by Mr. Boomer, it appears to me that it would have been quite as good as if filled up by Mr. Boomer himself; and the amount of the original demand having been reduced by a payment since action brought, there was, I think, a good reason for the amount being left blank, to be filled up with the precise

sum due at the date of the cognovit. The taking, under such circumstances, and after action brought, I consider as having been done through the intervention of a practising attorney, as required by the rule of court of Easter term, 9 Geo. IV. The remaining objections are to the *jurat of the affidavit*, on the ground that "it has an erasure in it, and an obliteration, and one figure written over another;" but the defendant's motion and rule do not shew the *particular affidavit* to which he refers as being irregular or defective in the jurat, and the affidavits do not point it out, though Mr. Boulton's affidavit refers to the swearing of the affidavit of *execution of cognovit*, before a person once a clerk but now a partner of the plaintiff. It is a rule that a party must point out the particular irregularities or defects on which he founds his application, and as he has not done so in this case, I do not feel called upon to infer from the general tenor of his application, or the arguments used in supporting it, that it must necessarily be to the affidavit of the execution of the cognovit that the defendant intends to object. From the last part of Mr. Boulton's affidavit it would appear as if one of the objections intended to be urged by him was, that the affidavit of the execution of the cognovit had been sworn before one Richard Brown, *formerly* clerk, but then a partner of the plaintiff. But this objection is not stated in the rule, and is not referred to in it as appearing in the affidavit, and cannot therefore be taken into consideration.

Rule discharged with costs.

HAIGH ET AL. v. BOULTON, ONE, &c.

A demand of plea in an action against an attorney must still be served in term, or within four days afterwards, notwithstanding the tenth rule of the new rules of court, and he cannot be compelled to plead in vacation to a bill and demand of plea served in the same vacation; but where a bill and demand of plea were served on an attorney in vacation, and interlocutory judgment was signed, and notice of assessment given to him on 21st September, for the assizes to be held on 10th of October, and he did not move in chambers against the proceedings, but gave notice of his intention to move in court in the following term, on the 11th October, and moved accordingly: it was held that his application was too late, and his rule was discharged.

James Boulton obtained a rule nisi to set aside the interlocutory judgment and assessment of damages against him in this cause for irregularity. By affidavit it appeared, that the defendant is an attorney; that a copy of a bill in the cause was served on him on 5th September last, interlocutory judgment signed on 14th September, and notice of assessment served on 21st of September, and damages assessed at the Home District Assizes on 11th October, on which day the defendant gave notice of his intention to move in Hilary Term against the interlocutory judgment, as having been signed too soon, without giving him a day in term to plead. The defendant relied upon the rule of court of Hil. Term, 1 Will. IV., by which, in cases of privilege, a demand of plea is substituted for a rule to plead, and "may be served at any time when, by the practice in England, a rule to plead might be given, and not before."(a)

(a) Cameron's Rules and Statutes, pages 13, 82.

Crooks shewed cause, contending that rule 10 of the new rules,(b) by which, as well in cases of privilege as otherwise, "the parties respectively shall be bound to plead in eight days after the service of a demand of plea, unless otherwise ordered by the court or a judge," abolished the right of an attorney to a day in Term to plead, and that the defendant should at any rate have moved in chambers, and was now too late in his application.

MCLEAN, J.—In England, where a bill was served four days before the end of term, and a rule to plead given, an attorney was bound to plead as of that term, but if not so served, he had the first four days of the following term to plead, and the only difference in this country before the new rules was, that a demand of plea was substituted for the rule to plead. But the plaintiff contends that the tenth of the new rules has abolished the attorney's privilege as to the time for pleading in term, and that at any rate the defendant has been guilty of laches, in not applying in vacation. I am of opinion, however, that the tenth new rule does not repeal or supersede that part of the rule of Hilary Term, 1 Will. IV., which says, that a demand of plea, in cases of privileged persons, "may be *served* at any time when, by the practice in England a rule to plead might be given, and not before," and this being the case, and the practice in England requiring that a rule to plead must be served in term time, the demand of plea in this case, served in vacation, is undoubtedly irregular, and the only question is, whether there has been such delay on the part of the defendant, in making this application, as now precludes him from taking advantage of the irregularity. I think that there has been, as he allowed eighteen or nineteen days to elapse after receiving notice of assessment, without applying in chambers to set aside the interlocutory judgment, or even giving notice to the plaintiff of any intention to move against it in term. The cases of *Scott v. Cogger*,(c) *Grant v. Flower*,(d) and *Cox v. Tulloch*,(e) are strongly in point against this application being in time.

Rule discharged.

DOE DEM. GILKISON v. SHOREY ET AL.

Where the plaintiff in ejectment declared for Lot 11 in 4th concession of Sidney and the tenant defended for Lot 12 in the same concession, stating it in his consent rule to be the same premises mentioned in the declaration, and the plaintiff, treating it as a nullity, signed judgment against the casual ejector, the court held the consent rule good, and set aside the judgment for irregularity.

Wallbridge obtained a rule nisi to set aside the judgment against the casual ejector for irregularity with costs, an appearance, consent and plea having been filed for the tenant. The declaration was served before Michaelmas Term. During Michaelmas Term, the defendant Shorey, by L. Wallbridge as his attorney, caused an appearance, warrant, consent and plea to be filed. In the consent the defendant admits the premises to consist of two messuages, two barns, two stables, two orchards, two gardens,

(b) Cameron's Rules, page 22.

(c) 3 Dowl. 212.

(d) 5 Dowl. 419.

(e) 3 Tyr. 578.

two hundred acres of arable land, two hundred acres of meadow land, two hundred acres of wood land, and two hundred acres of other land, being lot number *twelve* in the fourth concession of the township of Sidney in the Victoria District, and which he admits to be the same premises as those claimed by the plaintiff in his declaration and in the possession and occupation of the said William Case Shorey. The other defendants, German and Parry, appeared by Mr. Murney as their attorney, during the same Term. On the 10th October, the lessor of plaintiff, treating the consent, appearance and plea as of no effect and void, signed judgment against the casual ejector, and took out a writ of habere facias possessionem, returnable the first day of Hilary Term, but up to that day it was not placed in the sheriff's hands to be executed.

Adam Wilson shewed cause.

MCLEAN, J.—It is quite obvious that the defendants could not, if they intended to defend the suit, admit that they are in possession of lot number eleven in the fourth concession of the township of Sidney, when they claim the same parcel of land as being in fact lot number twelve. Had they defended generally for number eleven, they would be estopped on the trial, by the consent rule, from denying that they are in possession of that lot, and no question could arise as to the land being in fact known by another designation as lot number twelve. It was therefore correct in the defendants, to admit themselves to be in possession of number twelve, being *the same premises* claimed by plaintiff in his declaration. Now the plaintiff in his declaration claims *number eleven*, and the defendant admits he is in possession of the *same premises* as number twelve, so that on the trial the question must necessarily be whether the premises claimed by plaintiff and in possession of defendant, are composed of lot number eleven or twelve,—the very question which probably is intended to be brought up for decision in this action. In the case of the Canada Company *v.* Roe, Trinity Term. 1st & 2nd Will. IV., the tenant was allowed to enter into the consent rule without confessing possession of the premises mentioned in the declaration. But in the case of Doe Ross *v.* Roe, Michaelmas Term, 1st Vic., where the lessor of plaintiff and the tenant each claimed the land in dispute as part of a different lot, as in this case, the court, being applied to for the purpose, refused to allow the tenant to enter into the consent rule without confessing possession, but directed him to defend, setting out the premises in the consent rule according to his description, and stating them to be the same premises which were claimed by the plaintiff in his declaration. The direction of the court in that case has been strictly followed in this, and the premises so described that, as it appears to me, there can be but one question between the parties at the trial, viz. whether the defendant is in possession of number eleven or number twelve. It is objected by Mr. Wilson, on the part of the lessor of plaintiff, that the defendant had no right to enter into or file a special consent rule, without leave of the court. The tenant has a right at all times to defend instead of the casual ejector, but the landlord, or any other person having an interest, should be admitted, on application to the court, on affidavit. In this case the tenant has come in in the usual manner, to defend by filing his consent and other papers with the clerk, and I do not see any thing in the terms of the consent rule to make it necessary for him to make a special application to the court on the subject. He has only

described the premises in such a manner as not to preclude himself on the trial from disputing that the lot which he is in possession of, is number eleven in the fourth concession of Sidney. Mr. Wilson contends that the defendant had no right to give any other designation to the plaintiff's lot than is given to it in the declaration, but the defendant gives the designation of *number twelve* to *his own* lot, and admits that the premises are the same which are claimed by the plaintiff in his declaration. But if he had left out altogether the description of the lot as number twelve, the consent rule would still have been perfectly good, and the addition of that description, so far from vitiating it, in my opinion, tends to make the point at issue more certain. If the defendant, relying upon his lot being number twelve, and knowing that the plaintiff's claim for number eleven could not affect his *right*, had declined defending the suit, he would be liable to be dispossessed and put to great inconvenience and loss, and his only remedy would be by an action of trespass. He has however wisely chosen to meet the plaintiff's claim at once, and I do not see how he could do so otherwise than as he has done, to ensure a decision on the question at issue. This rule must therefore be made *absolute*.

Rule absolute.

QUEEN'S BENCH.

HILARY VACATION, 8 VICTORIA.

The judges delivering judgments were,—

THE CHIEF JUSTICE,
MR. JUSTICE JONES,
MR. JUSTICE HAGEMAN.

BOULTON v. FITZGERALD.

In trespass quare clausum fregit, the defendant pleaded that the plaintiff made his complaint to the justices of the peace of a forcible entry and detainer under the statute, and the justices summoned a jury and heard the complaint, and made a warrant for restoring the plaintiff to his possession, and that this was the same trespass as that complained of by the plaintiff. The plea was held bad on general demurrer.

The plaintiff declares in trespass quare clausum fregit, for entering his house, making a great noise, breaking doors, &c. and expelling the plaintiff. And in a second count, for an assault and battery. To the first count the defendant pleads that the plaintiff made his complaint to two justices of the peace, of a forcible entry and detainer under the statute, and the justices summoned a jury, and heard the complaint, and made a warrant for restoring the plaintiff to his possession; and avers that the complaint was for the same trespass as that complained of in the first count. The

plaintiff demurs to this plea, objecting that it is no defence, and that it is not stated that the trespass complained of in the first count was adjudicated upon.

Eccles, counsel for plaintiff.

Adam Wilson, counsel for defendant.

ROBINSON, C. J.—It can admit of no doubt in our opinion, that this plea is bad. It is not stated that the justices did award any damages to the plaintiff, or were asked to do it, and it is plain that the statutes of forcible entry give no power to the justices to do more than restore the party to his possession. The statute 8 Henry VI. ch. 9, sec. 6, gives treble damages to the plaintiff suing in trespass for such injuries, but gives no power to the justices to award any damages to the party disseized.

Judgment for plaintiff.

KISSOCK v. WOODWARD.

A. being indebted to B., and C. to A., a promise by C. that he will pay B. the debt due to him by A., in consideration that B. will discharge A. from the debt owing by A. to B., and an averment that B. did so discharge A., does not show a promise to pay the debt of another, requiring a note in writing within the statute of frauds.

The plaintiff declares for that whereas one Platt Smith, before and at the time of the making of the agreement of the defendant as hereinafter next mentioned, was indebted to the plaintiff in a certain sum of money, to wit the sum of 50*l.*, and thereupon heretofore and before the commencement of this suit, to wit, on the 10th day of January, 1844, in consideration of the premises, and that the plaintiff, at the request of the defendant, would acquit and discharge the said Platt Smith from his liability to pay the said debt to the plaintiff, he, the said defendant, agreed with the plaintiff to pay him the said sum of fifty pounds, on request. And the plaintiff avers that he, confiding in the undertaking of the defendant, did then acquit and discharge the said Platt Smith from his liability aforesaid, of which the defendant then had notice, and thereby and according to the tenor of the said agreement, the defendant then became liable to pay the said sum of money to the plaintiff, on request. Yet although the plaintiff, on the day and year aforesaid, requested the defendant so to do, the defendant hath not paid the said sum of money, or any part thereof to the plaintiff, but hath wholly refused so to do. The defendant pleads that the said promise was a special promise, to answer for the debt and default of another person, to wit the said Platt Smith, and that no agreement in respect of or relating to the promise and supposed cause of action mentioned, or any memorandum or note thereof wherein the consideration or considerations for the said special promise was stated or shewn, was, or is in writing, nor was or is signed by the defendant, or by any person thereunto by him lawfully authorised according to the form of the statute in such case made and provided, and this the defendant is ready to verify. To this the plaintiff demurs specially, on the grounds that the plea amounts to the general issue, and also, that the

promise in the declaration is not within the statute of frauds. Joinder in demurmer.

Eccles, counsel for plaintiff.

Vankoughnet, counsel for defendant.

ROBINSON, C. J.—It is objected to the declaration in this cause, that the first debtor is not averred to have been discharged by release under seal, but that is not necessary. It is the common form of declaring that has been followed in this case; the averment that the plaintiff did discharge the defendant is sufficient, for he undertakes to shew that he effectually discharged him, and a promise by words may before breach be discharged by words.(a) Neither is the declaration defective in not stating the promise to be in writing, for that is clearly not necessary even in cases under the statute, which this is not, the promise here being original and not collateral. It is scarcely necessary to say that the count is in *assumpsit*, and not in *tort* as the defendant objects, the word agreed being as applicable to the action of *assumpsit*, as the word promised, which latter happens not to be used in the first count. With regard to the plea demurred to, it cannot be supported, because the undertaking stated in the declaration is not, as the plea assumes, to pay the debt of another, but to pay the defendant's own debt, for the debt became his, when Smith was discharged in consequence of his undertaking.

JONES, J.—This is not a case within the Statute of Frauds, requiring a memorandum in writing, for it is not to pay the debt of another, but the debt in fact due by the party himself. It differs from *Cuxon v. Chadley*,(b) in this, that here, by the declaration, it appears that Smith was discharged by the plaintiff, which was a good consideration, both before and since the statute, without a note in writing. The objection, that it is not alleged in the declaration that the discharge was in writing under seal, is not tenable. The statement is, that the plaintiff "did discharge and acquit Smith," which means a legal discharge, and if there was in fact no legal discharge, the defendant might have taken issue on that allegation. The case of *Tyrrill v. Annis*,(c) lately decided in this court, is in point.

HAGERMAN, J., concurred.

Judgment for plaintiff.

ROBERTSON v. BROWN.

Where the plaintiff declared in case, charging the defendant with taking his mare on *loan*, and averring a breach of duty in not using her in a proper and careful manner, whereby she was injured and died, and the defendant pleaded that he obtained the mare from the plaintiff on a contract for *hire*, and not on *loan*, the plea was held a good answer.

The plaintiff declares that heretofore, to wit, on &c., the plaintiff loaned and delivered to the defendant, a certain mare of great value, to wit, of the value of 50*l.*, to be used by the defendant in that behalf in a careful, moderate, and reasonable manner; whereby it became, and then was, the duty of the said defendant to use the said mare in a careful, moderate, and reasonable manner, under the said loan, and to take due and proper

(a) Bac. Ab. Release A.

(b) 3 B. & C. 591.

(c) Ante, page 299.

care thereof, whilst he, the said defendant, had the same on loan, as aforesaid; and although the said defendant then had the said mare under the said loan as aforesaid, yet the said defendant disregarded his said duty, in this, to wit, that he did not, nor would, use the said mare in a careful, moderate, or reasonable manner while in his possession under the said loan, but then used the same in a careless, immoderate, unreasonable, and improper manner, and the defendant further disregarded his said duty in this, to wit, that he did not, nor would take due or proper care of the said mare whilst he had the same in his possession under the said loan as aforesaid, and the defendant, during that time, to wit, on the day and year aforesaid, therein made default, and behaved and conducted himself carelessly and improperly in that behalf; and by reason of the several premises, the said mare then became and was greatly injured, and died, to the plaintiff's damage of 50*l.*, and therefore he brings his suit, &c. To this the defendant pleads: As to the loaning to the said defendant of the mare of the said plaintiff, that he, the said defendant, obtained the said mare on a contract for hiring from the plaintiff, for the use of the said mare, at the time when, &c.; without this, that the plaintiff loaned the said mare to the said defendant, at the time when, &c., or at any other time, in manner and form as the said plaintiff has above alleged, and of this he, the said defendant, puts himself upon the country, &c. The plaintiff demurs specially, assigning for cause, that the plea raises and tenders an immaterial issue, and is no answer to the breach of duty complained of. Joinder in demurrer.

Ewart, counsel for plaintiff.

A. Wilson, counsel for defendant.

ROBINSON, C. J.—If, before the new rules of pleading, the defendant had pleaded the general issue to such a declaration, and on the trial the contract was proved to be one of hiring and not of loan, I conceive the plaintiff would fail, because he had stated his contract untruly. Now if so, the defendant must have the same benefit of the variance, if he expressly denies that he made such a contract as he is charged with, for he admits, by so pleading, only, that he did not use due care with reference to a contract of hiring. The plaintiff charges him with taking the mare upon loan, to be used in that behalf, in a careful, reasonable, and moderate manner,—that is, that he had her upon the agreement either expressed or implied, though, I think, it means expressed, that he should take such care of her as would be reasonable in a borrower. The defendant answers that he did not take her upon loan in manner and form as the plaintiff has alleged, that is, to use her with reasonable care in that behalf, or as a borrower, but that he simply hired her. If the declaration charges him with an express agreement as a borrower, he denies it. If it means to imply merely an agreement to use reasonable care as a borrower, he says the relation did not exist, for that he hired her, and so denies the implied assumpsit, and the duty raised upon it. The declaration besides seems to rest also upon the duty of the defendant as a borrower, in addition to his agreement to use due care, and so far as the duty is concerned, it is very material to distinguish whether the mare was in fact held on loan or on hire, for the degrees of responsibility are admitted, by the best writers on the subject, to be different.

JONES, J.—Upon the contract stated by the plaintiff, the defendant

was liable for slight negligence ;(a) on a hiring he would not be so liable.(b) The plea, therefore, alleging that the mare was hired, and not loaned, on which the defendant concludes to the country, is a good plea.(c)

HAGERMAN, J., concurred.

TIMON v. STUBBS AND BALFOUR.

The want of notice of action in a suit against a bailiff of a Division Court, acting in his office under 4 & 5 Vic. ch. 3, must be pleaded, and cannot be given in evidence under the general issue. But where under that act, a bailiff seizing and selling goods under an execution, is entitled to notice, the plaintiff in the execution is not, as he is not within the protection of the sixth clause, as a "person acting in the execution of the act."

To trespass for taking the plaintiff's cattle, the defendants plead the general issue (not marked in the record as "by statute"); and secondly, that the cattle were not of the goods of the plaintiff. It was proved at the trial, that Balfour, as a bailiff, had seized the cattle on an execution against one Gallagher, at the suit of this defendant, Stubbs, from the Division Court; that they were seized on the premises of Gallagher, who told the bailiff that they were not his, but belonged to Timon, the plaintiff, who is his brother-in-law, and the proprietor of the land on which Gallagher lived; that Stubbs was not present at the seizure, but attended at the sale, and that when Timon claimed the property, he directed Balfour to go on and sell. There was evidence that the cattle belonged to the plaintiff, though the circumstance of Gallagher having been allowed for three or four years to keep them on the place as his own was suspicious. It being stated, however, by the plaintiff's counsel in his opening, that the cattle had been seized by Balfour as bailiff upon an execution from the Division Court at the suit of Stubbs, the learned judge held the defendants entitled to notice and nonsuited the plaintiff.

Duggan, for the plaintiff, moved to set aside the nonsuit, and to be allowed a new trial without costs, on the ground that a notice of action was not necessary.

Eccles shewed cause.

ROBINSON, C. J.—The first point to be considered in this case is, whether, since the new rules of pleading, the objection that no notice of action was given under the statute 4th & 5th Vic. ch. 3, can be taken advantage of under the general issue. The words of the 6th clause are, "And for the protection of persons acting in the execution of this act, be it enacted, that all actions and prosecutions to be commenced against any person for anything done in pursuance of this act, shall be laid and tried in the district where the fact was committed, and shall be commenced within six calendar months, and not afterwards, *and notice in writing of such action and of the cause thereof shall be given to the defendant one calendar month at least before the commencement of the action*; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, &c." It seems to have been settled in England, that under an enactment of this description, the

(a) Jones on Bailments, 64, 65.

(b) Ib. 88, 89.

(c) 3 Camp. 5 (n.); 9 C. & P. 383, 632.

want of notice must be pleaded, though it would have been otherwise if the statute had said that the plaintiff *shall not recover in any action* without having given such notice, &c.;(a) so that it does not appear that the defendants were in a situation to take the objection. In some of the British statutes, where such protection is given, it is enacted, that the plaintiff shall not give evidence of any cause of action not contained in the notice, and in such cases I conceive the objection would be open to the defendant, though he had not denied notice by a special plea. I cannot distinguish this case from *Lane v. Glenny*, on the language of our statute. But however this may be, the defendant, Stubbs, being merely the plaintiff in the action, was not on that ground entitled to notice, nor on the ground of his directing the defendant to proceed and sell for his benefit; he was in both instances acting as the principal, and is not within the protection provided by this clause for *persons acting in the execution of this act*.^(b) He was voluntarily setting the proceeding in motion for his own benefit. The consequence is, that as Stubbs is not entitled to notice, the other defendant, Balfour, having joined him in pleading, loses the advantage of his privilege as a bailiff. The rule must, in my opinion, be made absolute for setting aside the nonsuit and granting a new trial without costs, *though* upon the last trial the *evidence* certainly did not seem to support satisfactorily the plaintiff's right of action on the merits.

Rule absolute.

KEELER v. BROUSE.

The court refused to allow the plaintiff his costs in an action brought by him on a judgment, where it appeared that after execution he had commenced the suit by proceeding by attachment, under the Absconding Debtor's Act.

Vankoughnet moved for a rule nisi to allow the plaintiff to tax his costs of suit in this action, brought on a judgment obtained by him against the defendant. The rule was moved under the provincial statute 49 Geo. III., ch. 4, sec. 2, which provides "that in actions brought *upon any judgment* recovered in any court of this province, the plaintiff in such action on the judgment, shall not recover or be entitled to any costs of suit, unless the court in which such action on the judgment shall be brought, or some judge of the same court, shall otherwise order." The plaintiff filed affidavits in support of his motion, setting forth that he had failed in obtaining satisfaction of his judgment by executions against the defendant's goods and lands; that he had heard he had conveyed away his lands to evade payment of his debts; that he took out several writs of ca. sa., which could not be executed, and were returned non est inventus; that, believing that the defendant concealed himself to avoid being served with process, he considered that he was entitled to avail himself of the Absconding Debtor's Act, and sued out an attachment, and proceeded against the defendant in an action on the judgment, and had recovered a verdict for the amount of the first judgment with interest and costs of the several executions. And that he had a further motive for proceeding by attachment, having heard that a sum of money belong-

(a) *Lane v. Glenny*, 7 Adolp. & Ellis, 83; *Wagstaffe v. Sharpe*, 3 M. & W. 521.

(b) 4 Ad. & Ell. 778; 3 Wils. 344: Strange 509, 994; 1 Holt, 478.

ing to the defendant had been paid into the sheriff's hands, which he expected to be able to secure under the attachment; but that he failed in this, the money having been paid over to another party before notice of the attachment could be given.

ROBINSON, C. J.—We do not consider this a case in which we should make an order under the statute 49 Geo. III., ch. 4, entitling the plaintiff to costs in the action which he has brought on a judgment, without determining (which is not necessary on this motion), whether there is anything irregular in his proceedings under the Absconding Debtor's Acts. It is clear, we think, that the plaintiff has availed himself of the provisions of those statutes, in a case not coming within the spirit or intention of them. He was under no difficulty by reason of not being able to bring the defendant into court to answer his action, for he had obtained a judgment against him. The statute 5 Will. IV., ch. 5, sec. 4, assures to him his priority over all the attaching creditors, and he may proceed with his execution against the lands or goods of his debtor, whether they shall have been attached or not, and wherever they may be found, in the same manner as if the debtor had not absconded. His remedies are not interfered with by the Absconding Debtor's Acts, which were clearly not passed with any view to cases in which the party might abscond after judgment, or after being served with process. There is, to be sure, an advantage extended to creditors under the Absconding Debtor's Acts, of being able to collect debts due by third persons to the absconding debtors, and obtaining satisfaction thereby of their own debts; and it may become a question, whether a person in the situation of this plaintiff comes within the scope of that provision—without determining at present that he may not be considered to do so, we do not think this a proper cause for ordering costs under the statute 49 Geo. III. ch. 4: he has made a doubtful experiment, and, as appears by his affidavits filed, without any successful results, to obtain an advantage under statutes which seem, at least, not to have been intended to embrace such cases. (a) Rule refused.

DOE DEM. MCQUEEN v. VOOSBURGH.

A judge at nisi prius has no power to amend a consent rule in ejectment.

Ejectment for part of lot No. 19 and the broken front thereof, in the first concession of the township of Kingston. The defendant, by the consent rule, defended for one acre of land only, which he so described by metes and bounds that it embraced no part of the land covered by the plaintiff's title deed, which was a mortgage from the defendant to the plaintiff. Discovering this, the plaintiff moved at the trial to amend the consent rule, and the learned judge allowed him to do so, but, doubting his authority to amend the consent rule at the trial, reserved leave to the defendant to move to set aside the verdict, which was taken for the plaintiff. The defendant moved accordingly.

ROBINSON, C. J.—It is obvious that the consent rule covers none of the land mentioned in the declaration, from an error committed by the defendant, in describing the land to which he limited his defence—his first course from the point of departure being by his mistake called *southerly* instead of *northerly*, taking him out of the lot claimed altogether;

(a) See *Hanmer v. White*, 1 Dow. & Lown. 653.

so that he, in fact, did not admit himself to be in possession of any portion of the land which the plaintiff is seeking to recover. We make the rule absolute for setting aside the verdict, but without costs, as the error was the defendant's.

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Rule absolute.

DOE DEM. PHILLPOTT v. BLANCHFIELD.

A deed made by one brother to another, in consideration of natural love and affection, is void against a subsequent purchaser from the grantor for valuable consideration.

Ejectment for the east half of lot No. 21, in the sixth concession of the township of Dorchester. This half lot was, on the 7th of February, 1844, conveyed to the lessor of the plaintiff by *John Blanchfield*, by bargain and sale in fee, for the consideration of £100. It was proved that *James Blanchfield* had obtained a grant from the crown for the land in question on the 30th January, 1816; that he died ten or twelve years ago, leaving no will; that *John Blanchfield* is his eldest son and heir, and the defendant *James* a younger son; that, after the father's death, it was agreed among the members of the family that *John*, as the heir, should make a deed of one hundred acres of land to each of his brothers, and he did accordingly execute a deed to this defendant, *James*, for the said premises; that the defendant being then a minor, the deed was never delivered to him, but was deposited in the hands of a third party, who acted as his friend or guardian; that no consideration was paid on this transfer; that afterwards, when the defendant came of age, his brother *John* made an exchange with him, conveying to him land in *Gosfield* instead of the hundred acres in question; and that the defendant gave in consequence a written order upon the person with whom the first deed had been deposited, desiring him to give that deed to *John*, which was done, but neither that deed, nor the deed to the defendant for land in *Gosfield*, was produced. The plaintiff contended that the first deed was never in fact delivered to the grantee, and so was an imperfect conveyance, and being afterwards surrendered by his desire and other lands given to him instead, it could form no obstacle to the plaintiff's recovery under the deed which *John Blanchfield* made to him in February, 1844, as the title had never vested in *James Blanchfield* under it; and, further, he contended that, even if the deed first made to *James* could be treated as having been perfected by delivery, yet it was a voluntary conveyance merely, and could not prevail against the subsequent conveyance made to a bona fide purchaser for value, which the lessor of the plaintiff was proved to be. On the other hand, it was contended, that the first deed, being made for the consideration of natural love and affection, and moreover in order to carry into effect the disposition which it was presumed the father would have made of his lands among his children, could not be treated as void against the subsequent purchaser. The learned judge did not leave to the jury any question upon the fact of delivery of the first deed, but, considering the right of the plaintiff to rest wholly upon the point of the first deed being voluntary, he reserved that question for future consideration. A verdict was found for the lessor of the plaintiff, subject to the opinion of the court.

Crawford, counsel for plaintiff.

Blake, counsel for defendant.

ROBINSON, C. J.—We think that the learned judge was correct in his opinion, that there was no sufficient ground for leaving it as a doubtful question of fact to the jury, whether the deed had been delivered or not. There was nothing to shew any intention to withhold the deed, and to reserve it as an escrow. It was given into the hands of the infant's guardian to keep for him, and when he came of age he assumed the right of control over it by sending a written order that it should be delivered up to his brother, and it was delivered up accordingly. This is, indeed, a much stronger case in favour of the deed having effect, so far as the question of delivery merely is concerned, than many that are reported in the books, where the deeds have been left to their effect, though the grantor had never parted with the possession of them, nor shown any intention to do so. I do not see, however, that the first deed in this case was proved in such a way as to entitle it to be received in evidence; but, admitting it to be so, still we are all of opinion that it was clearly a voluntary deed within the intent and meaning of the statute 27 Eliz. ch. 4, and not such as can prevail against the subsequent conveyance to the lessor of the plaintiff, who appears to have been a bona fide purchaser for value. If, indeed, the father had made the first deed to the son, and after his death the heir had sold the land to Phillott, it seems that the case would not come within the statute; but when both deeds have been made, as in this case, by the same person, and the first is without any consideration to support it, we must treat it as voluntary. It was attempted to support it on the footing of its being made in compliance with the understood intention of the father; but, besides that there was no proof whatever of any declaration or intention of the father on the subject: it would be impossible to treat it as otherwise than voluntary on that account. So far as the evidence enables us to judge of the first deed, it would seem indeed to have been incapable of operating as a bargain and sale, for want of any consideration expressed or proved aliunde, even if there had been no subsequent purchaser entitled to be preferred under the statute. It is upon the latter ground, however, that we determine the verdict for the plaintiff to be right.

Rule discharged.

MUCKLEROY v. BURNHAM.

The mother of an illegitimate daughter may maintain an action for her seduction.

The plaintiff sues the defendant in case for seducing Agnes, the "natural" daughter and servant of the plaintiff, alleging loss of service, expenses, &c., in consequence of the injury. The trespass is laid on the 8th August, 1841, and on divers other days, &c. And, in the second count, the girl is stated to be the daughter and servant of the plaintiff, not the *natural* daughter, as in the first count. The defendant pleads the general issue; and, secondly, denies in several pleas to the two counts that Agnes was the servant or the daughter of the plaintiff. The facts were these: The plaintiff is the mother of the girl seduced, who is her illegitimate child. The girl had always lived with her, doing acts of service, as is usual in her station of life for children to do. In March, 1841,

being then about sixteen years of age, she went to live as a hired servant in the family of a Dr. McSpadding, and while remaining in his service in the month of July following, she was seduced by the defendant. About a week after this first occasion of criminal connection with him she left McSpadding's, and returned to the plaintiff's, where she remained for a week or ten days; and then, by the desire of the plaintiff, and at the request of Mrs. McSpadding, she returned to stay with her until she could procure another servant. Immediately on her going this second time to Dr. McSpadding's, the defendant, who was living in that house, had criminal intercourse with her a second time. She remained there about ten days, and then returned to the plaintiff's, where she remained for about three months, unable to do the work she had been accustomed to do, and then went to live in service in Toronto, where the child was born on the 1st May, 1842. She swore that she had been in the habit of paying to the plaintiff some portion of the wages which she had received while hired at McSpadding's, that is, before the first criminal act, and that when she went to live there for a few days only she was not to receive any wages. The plaintiff relied upon the evidence being sufficient to satisfy the jury that the injury resulted from the second act, which took place while the girl was merely temporarily absent from the plaintiff's on a visit with the intention of returning, having just before her departure performed acts of service for the plaintiff (of which there was some proof), and having usually while living with the plaintiff assisted in the work of the house. Under such circumstances, the counsel for the plaintiff contended that he was entitled to regard the plaintiff as being *in loco parentis*; and that the plaintiff ought to recover on the same footing as an aunt or other relation would, or any other person who might have adopted the girl as a daughter. The learned judge doubted; but left it to the jury to estimate the damages, reserving leave to the defendant to move for a nonsuit, if, under the facts, this action on the case for consequential damages could not be maintained. The defendant's counsel contended that there could be no other action for the alleged injury than an action of trespass by Dr. McSpadding, as the actual master of the girl. The jury found a verdict for the plaintiff on the first count, and 137*l.* 10*s.* damages, and for the defendant on the second count.

Last term, *Crooks*, on behalf of the defendant, moved to enter a nonsuit, on the points reserved at the trial, or for a new trial, on the law and evidence, and for misdirection.

McKenzie shewed cause.

ROBINSON, C. J.—We are of opinion that this verdict should be allowed to stand. It rests on the common law principles on which such actions are sustained, independent of our statute 7 Will. IV. ch. 8, and is supported, in our opinion, by the current of English authorities. *Edmondson v. Matchel*, (a) and *Irwin v. Dearman*, (b) and other cases, sufficiently establish that a person standing *in loco parentis* may bring this action, and recover compensation for injury to wounded feelings, in the same manner as a parent may; the claim, in such a case, not being necessarily restricted to the actual damage resulting from loss of service and expenses attending the illness of the female seduced. The case of *Dean v. Peel*, (c)

does not militate against the plaintiff's right to recover in this case upon the other ground, namely, that the girl seduced was not, at the time of her seduction, living with the plaintiff, because *there* the court *expressly grounded* their decision upon the statement of the girl, that she had *no intention of returning*. She had been some months from home before the seduction, and was filling the place of housekeeper in the house of a relative, though not on wages. *Here* the girl's former relation of servant to Dr. McSpadding had ended; and she had returned home before the second act of intercourse. It is impossible to say, with certainty, whether the injury to this plaintiff resulted from the first access, or the second. The jury cannot be said to have decided against evidence in imputing it to the second. At that time she had just left the house of the plaintiff, who had brought her up as a child, and whose child in fact she was, though not born in wedlock. She had been a few days only absent, for a temporary purpose, was not on wages, was underage, and had the intention of speedily returning, as in fact she did, after the seduction, though not as it appears solely in consequence of it. The facts of this case are not such as, in our opinion, compel us to deny that the plaintiff is entitled to the remedy which she is seeking.

JONES, J.—When a daughter above the age of twenty-one is absent from her father's house (with the *animus revertendi*) with his consent, and is seduced, the action lies, but most clearly so, when the daughter is under age; (a) but when there is no *animus revertendi*, the action does not lie. (b) The aunt with whom a female resides as a servant, and a person who has adopted a female, stand *in loco parentis*, and may maintain an action for the seduction of the servant or adopted daughter. (c) The illegitimate child living with her mother as her servant, stands, to say the least of it, in the same situation as an adopted daughter—I think she is more, and that therefore the mother of an illegitimate child may bring this action. The evidence in this case is such as would entitle the father to bring an action for the seduction of his daughter, and the mother of the illegitimate daughter stands *in loco parentis*, and may therefore sustain the action.

HAGERMAN, J., concurred.

Rule discharged.

MURRAY v. MILLER.

Where in an action by the indorsee against the maker of a promissory note, the defendant pleaded that at the time the note was given, a mortgage was taken by the payee of the note, with a proviso for its payment according to the tenor of certain promissory notes, bearing even date therewith, payable to the payee, and that the note declared on was one of those promissory notes, and was indorsed to the plaintiff after it was due, the plea was held bad, as by the very terms of the mortgage, it was evidently taken as a collateral security, and not in satisfaction, or as a merger of the promissory notes.

The plaintiff declares in assumpsit against the defendant, as the maker of a promissory note for 310*l.*, payable to one Robertson, and by him indorsed to Moffatts, Murray & Co., and by them indorsed to the plaintiff. The defendant pleads, that after the making of the note, and before the

(a) 5 E. 45.

(b) 5 E. 45.

(c) 2 T. R. 4; 11 E. 23.

indorsement and delivery to Moffatts, Murray & Co., and before the indorsement to the plaintiff, a mortgage was made between the defendant and Robertson, of certain premises of the defendant of which he makes profert, subject to a proviso for making the same void, if the said defendant, his heirs, executors, administrators or assigns, should and did well and truly pay unto the said Ross Robertson, his executors, administrators or assigns, the full and just sum of 1150*l.* of lawful money of Upper Canada, in manner and at the times following, that is to say : the sum of 265*l.* on the 24th day of May which will be in the year of our Lord 1838 ; the further sum of 280*l.* on the 24th day of May which will be in the year of our Lord 1839 ; the further sum of 295*l.* on the 24th day of May which will be in the year of our Lord 1840 ; and the further sum of 310*l.* on the 24th day of May which will be in the year of our Lord 1841, according to the tenor of certain promissory notes drawn by the said defendant, payable to the said Ross Robertson, and bearing even date with these presents, without any deduction or abatement. And that the said promissory note in the said proviso mentioned, and therein described as bearing even date with the said in part recited indenture ; whereby the said defendant promised to pay to the said Ross Robertson, or order, the sum of 310*l.*, Hx. Currency, (meaning Halifax currency), to wit, lawful money of Canada, is the same promissory note in the said declaration mentioned, and the said Ross Robertson then and there accepted and received the said indenture. And that the said promissory note was not indorsed or delivered by the said Ross Robertson, to the said Moffatts, Murray & Co., nor by the said Moffatts, Murray & Co., to the said plaintiff, until after the day therein mentioned for the payment of the said sum of 310*l.* therein mentioned, to wit, on the 1st day of January, 1844, and this the said defendant is ready to verify. The plaintiff craves oyer of the indenture, and after setting it out, demurs specially on the ground that the mortgage was not delivered in satisfaction or discharge of the note, nor accepted as such. Joinder in demurrer.

Eccles, counsel for plaintiff.

Crooks, counsel for defendant.

ROBINSON, C. J.—It seems to me that the mortgage must, in such a case as this, be treated as being taken as further security, and intended merely to give the payee of the notes a better remedy against the maker, in case he should be obliged to have recourse to him, in consequence of his failing to pay to the holders of the notes, when due, the sums mentioned in them. It cannot be allowed to have the effect of interfering with the remedy, which the holders of these negotiable notes might have upon them, against the maker or other parties. The object in taking them we may reasonably suppose was, to enable the payee, Ross Robertson, to obtain the money presently if he pleased, by discounting them, and there is no authority for holding that the endorsers of the notes would lose their remedy upon them against the maker, because he had given the payee security on real estate to ensure their ultimate payment, and the payee had taken it to indemnify himself in case he should have to pay them in consequence of having negotiated them. The only ground for raising a question, arises from the fact stated in the plea, that the note was not negotiated by Ross until after it had fallen due. Does the principle that the holder of a note taking it by indorsement after the day of payment, holds it subject to every legal and

equitable defence that could be urged against the payee, apply to such a case as this? I apprehend not. The defendant has no reason to urge why the payee should not recover his money, but merely a reason why he cannot sue him on this note, on account of there being between them a higher security for the same debt; but between these parties, the maker and indorser, there is no such impediment to following the remedy on the note, which was clearly intended from the nature of the transaction. There is nothing to be urged why the defendant should not pay the money, and, as between him and the holder of the note, there is no technical difficulty in the way. Mr. Justice Bayley, in his treatise on bills, page 267, says, "Taking security of a higher description, as a bond, or judgment, for the money due upon a bill or note, extinguishes the holder's claim upon the bill or note; as against the party giving that security, *it does not satisfy it.*" This I take to mean, that when the holder of the bill takes a higher security for the debt, his claim under the bill is extinguished. But here, the face of the mortgage shews, that whatever might be the strict legal effect of the mortgage under other circumstances, it was not intended here, that the notes were to be cancelled by it. The defendant, Miller, binds himself in his mortgage, to pay the sums mentioned in it, to Ross Robertson, according to the tenor of certain promissory notes, of which this is one, as appears by a comparison of dates and parties and sums, for we are not to assume that there were two notes exactly answering to the same description. Then when Miller pays the money to the order of Ross Robertson, upon the note referred to, which is negotiable as it is set out, he pays it to Ross Robertson according to the tenor of the note, and surely the mortgage expressly leaves him at liberty to do that, and contemplates that he may. The payee could not indorse the note away, receiving, as we must suppose, the money for it from the indorsee, and while it is out, still retain his claim against Miller upon his mortgage. The plaintiff is entitled to judgment, in my opinion.

JONES, J., and HAGEMAN, J., concurred.

Judgment for plaintiff.

ADAMS ET AL. v. KINGSMILL.

Where to trespass de bonis asportatis against a sheriff, he justified under a writ of execution, and alleged that the goods in question had been fraudulently sold and delivered to the plaintiffs by the debtor, to defeat the execution, the plea was held bad because it did not shew the judgment upon which the execution issued.

Trespass de bonis asportatis. The defendant pleads that before the said time when, &c., one George Adams was possessed of the said goods and chattels in the declaration mentioned, and in order to avoid an execution about to be levied upon his goods and chattels, he, the said George Adams, fraudulently sold and disposed of the same goods and chattels in the said declaration mentioned, before the said time when, &c., to the plaintiff; and the defendant further saith that one John Michael Tobin, and one Andrew Murison, on the first day of July, in the year of Our Lord one thousand eight hundred and forty-four, sued and prosecuted out of the court of our lady the Queen before the Queen herself at Toronto, a certain writ of our said lady the Queen, called a fieri facias,

directed to the sheriff of the district of Niagara, by which said writ our said lady the Queen commanded the said sheriff, that of the goods and chattels of the said George Adams, in the said sheriff's district, he should cause to be levied the sum of two thousand five hundred and eighteen pounds, sixteen shillings and eleven pence damages, which the said John Michael Tobin and Andrew Murison had sustained by reason of the not performing certain promises and undertakings then lately made by the said George Adams to the said John Michael Tobin and Andrew Murison, as for their costs and charges by them expended about their suit; and that the said sheriff should have that money before our said lady the Queen at Toronto, on the first day of Michaelmas term then next, to render to the said John Michael Tobin and Andrew Murison for their damages aforesaid; and that the said sheriff should have then there that writ, which said writ afterwards, and before the delivery thereof, to the said sheriff, as hereinafter mentioned, to wit, on the day and year last aforesaid, was duly endorsed with a direction for the said sheriff to levy the sum of two thousand five hundred and twenty pounds nine shillings and five pence, besides interest and the sheriff's fees; and which writ, so endorsed, afterwards and before the execution thereof, to wit on the day and year last aforesaid, was delivered to the now defendant, who then, and from thence, until, and at, and after, the execution of the said writ, was sheriff of the said District of Niagara, to be executed in due form of law. By virtue of which said writ, the defendant so being sheriff of the said district of Niagara, to wit, at the said time when, &c., in the said declaration mentioned, and within his district, as such sheriff as aforesaid seized and took in execution the said goods and chattels in the said declaration mentioned, so fraudulently sold and disposed of by the said George Adams, to the said plaintiffs, and the defendant, at the same time when, &c., sold and disposed of the same upon, and in satisfaction of the said writ of execution, so far as the same did satisfy the same, as he lawfully might for the cause aforesaid, which is the same seizing, taking, and converting of the said goods and chattels in the said declaration mentioned, and complained of, and this the said defendant is ready to verify. Demurrer and joinder.

Eccles, counsel for plaintiff.

Burns, counsel for defendant.

ROBINSON, C. J. This plea cannot be supported, for it does not state that an execution at the suit of any creditor had been placed in the sheriff's hands before George Adams sold the goods to the plaintiff. It says indeed that he fraudulently sold them in order to defeat any execution about to be levied, but that neither directly avers that there was an execution in the sheriff's hands, or that any had issued. And the allegation that he fraudulently sold and disposed of them does not plainly imply any thing more than that he himself acted with that fraudulent view; not that the plaintiffs were colluding with him to defeat a creditor, or that they bought otherwise than *bonâ fide*.

Upon the point which was mainly argued in the case, namely, whether the defendant ought to have set forth a judgment on which the *f. fa.* pleaded was founded, we are of opinion that it was necessary he should, this action being brought by persons who are strangers to the judgment, and out of whose possession, nevertheless, the goods were taken. In such cases the officer is clearly bound to show a judgment to support the

writ, though it would have been otherwise if the plaintiffs had been a party to the judgment.

The case of *Martin v. Podger*, 5 Burr. 2631, recognizes the principle, though it was cited in the argument as supporting the plea, on the ground that it laid down an exception, as to the necessity of shewing the judgment, in cases where the sale was merely colorable; but in that case the goods were taken out of the possession of the original owner, the defendant in the *fi. fa.*, and the sale was held to be a mere pretended sale, not designed to pass the property, as between the parties. This plea sets out no such case.

Judgment for plaintiffs on demurrer.

BOAG V. LEWIS ET AL.

Although by the words of the provincial statute 51 Geo. III. ch. 9, sec. 6, against usury, contracts, bonds, &c. are declared void only where usurious interest is reserved *and* taken; yet the court will construe "and" to be "or," particularly as the statute 7 Will IV. ch. 5, sec. 3, declares in the preamble "that *by law* all contracts and assurances whatever, for payment of money, made for an usurious consideration, are utterly void;" and, therefore, a plea to an action on a promissory note, that the note was given to secure a debt, and was for an usurious consideration for forbearance, was held good, although it did not state that the usurious interest was paid or received.

The plaintiff declares against the defendants as makers of a promissory note for £49 9s. 9d., bearing date the 22d day of March, 1843, and payable one year after date. The defendants plead that just before and at the time of the making and delivery of the said promissory note by them (the defendants) to the said plaintiff, they (the defendants) were indebted to the plaintiff in the sum of £49 9s. 9d.; and being so indebted, it was then and there corruptly agreed upon by and between the plaintiff and the defendants, that the plaintiff should forbear and give day for payment to the defendants of the said sum of money in the said promissory note mentioned, from the said 22d day of March, in the year of our Lord 1843, until and upon the said 22d day of March, in the year of our Lord 1844; and that, for such forbearing and giving day for payment, he (the plaintiff) should take, accept and receive of and from the defendants, and they (the defendants) for such forbearing and giving day for payment, should pay unto the plaintiff upon the day and year last aforesaid a large sum of money, to wit, at and after the rate upon the said sum of £49 9s. 9d. for the time aforesaid, of £12 for the forbearing of a £100 for a year, being the sum of £5 18s. 9d., at and after such rate, upon the said sum of £49 9s. 9d., for a year; and therefore, and in pursuance of the same corrupt agreement, the defendants made their said promissory note, as above-mentioned, to the plaintiff, contrary to the form of the statute in such case made and provided; and which said rate of £12 for the forbearance of £100 for a year, upon the said sum of £49 9s. 9d., for the forbearing and giving day of payment as aforesaid, to wit, the sum of £5 18s. 9d., exceeds the rate of £6 for the forbearance of £100 for a year, contrary to the statute in such case made and provided, whereby, and by force of such statute the said promissory note is wholly void; and this the defendants are ready to verify. To this plea, the plaintiff shews specially the following causes of demurrer: that the said defendants have

not in their said plea averred that the said plaintiff, in pursuance of the usurious contract set out in the said plea of the said defendants, received, or that there was paid to the said plaintiff any part of the said sum of money agreed to be paid for the forbearance of the said sum of £49 9s. 9d., by the said plaintiff to the said defendants; and that the said plea is in other respects insufficient. Joinder in demurrer.

Blake, counsel for plaintiff.

Adam Wilson, counsel for defendants.

ROBINSON, C. J.—This plea is undoubtedly good. It states a case of an original corrupt agreement to take twelve per cent. interest for a year's forbearance of a debt of £49 9s. 9d. then due, and that upon such agreement the note now sued upon was given for the £49 9s. 9d., making it payable in a year. It is contended that the note should bind the defendants to pay a sum which includes usurious interest, but that is clearly not necessary in order to make the security void under the statute; and, in fact, it often happens that upon such usurious agreements, the instrument or security taken, is only for the just debt. But here the plaintiff argues that in such cases the security will not be void, unless excessive interest have been paid; that agreeing to pay it merely will not suffice, though it was upon such corrupt agreement the security was given (*a*). I am clear that, under the English statutes, this note is void under the facts stated in the plea, and so it would equally have been if it had been but for a small part of the debt; for, so far as regards the enforcing a remedy upon the instrument given in pursuance of the corrupt agreement set forth, the whole debt is tainted with usury, though the original debt, as it stood untainted with any usurious agreement, may be recovered upon such evidence of the debt, as the plaintiff may be able to give without resorting to the note, which the statute makes void. The question remains, whether our statute (*b*) places the matter on a footing different from the English statutes against usury; the language certainly is different. I attach no importance to the insertion, doubtless inadvertent, and, strictly speaking, inaccurate, of "and" instead of "or"—thereby requiring, as it is argued, that, to make the security void, usurious interest must not only be *reserved by* or upon it, but that it must also be *received*; for this would involve the absurdity pointed out by Mr. Wilson in his argument, that, to make the security void, the defendants must first pay the money reserved by it, and when that is done there can be no occasion to enforce the security. The difference is rather, that our statute departs from the English Act in so closely connecting the words "whereupon" and "whereby" with the words "bonds, contracts or assurances," as to seem at first sight to make it necessary, that the written instrument on which the question arises should reserve illegal interest; whereas in many cases, as in this, though the transaction may be usurious in pursuance of which the instrument is given, yet the instrument itself may cover nothing but the just debt, or the debt with legal interest. Of the English statutes, the statute 13 Eliz. ch. 8, sec. 3, clearly avoids this objection by the mode of expression—referring the excessive interest to the "loan" made; in other words, to the *agreement*, and not to the *security*. So also 21 Jac. I. ch. 17, sec. 2, though less

(*a*) Cro. Jac. 507; 5 Taunt. 369.

(*b*) 51 Geo. III. ch. 9, (See 6).

clearly, by making the words "whereupon" or "whereby" refer to the words "upon or for any usury;" whereupon or whereby, that is, money lent upon any "interest," which is in strictness "usury," "whereupon or whereby." 12 Anne statute 2, ch. 16, is in the same form of words as the 21 Jac. This, however, must be admitted, that although our statute departs from the more proper language of these enactments, yet it has always received the same construction and effect, and in cases where this diversity has been noticed. It must also be admitted that any other construction would be absurd in its effect, reducing the statute to a mere nullity or very nearly so, for it would be rarely that the bond or note would be found to cover upon the face of it, excessive interest. It is, moreover, material that our statute 7 Will. IV. ch. 5, sec. 3, does contain a legislative exposition of the intention of the former act, which assimilates it to the English statute law in this respect; and such construction is not wholly repugnant to the language, for the word "contract" there used does not necessarily mean only a written contract, and so may extend not only to the assurance, but to the agreement for the forbearance, making that void, and then the note is given upon an illegal and void contract, prohibited by statute. It is contended that this being a penal act, the word "and" cannot be read "or," and that therefore, to make the security void for usury, excessive interest must actually be *taken*, that is, *received* under it by the lender. According to this construction, it would follow that in every case of a security taken upon an usurious contract, if the party giving it should refuse to pay anything upon it, it might be enforced to the full extent by an action, and usury would be no defence. It is impossible to believe that the legislature used the word "*taken*" there, in the same sense as "*paid*," when it makes their enactment so utterly absurd and inoperative. We are bound so to construe the language of acts of parliament, if it be possible, as to make their provisions sensible and consistent with reason. The word "*taken*" is not necessarily equivalent to "*paid*," and, as used in this clause, it could not have been so intended; a "*contract*," whereby or whereupon more than legal interest is taken, may be understood, I think, to mean a contract by which it is agreed that such illegal interest shall be taken. The word in common discourse is often so used; as, for instance, if one person, hearing that another had let his house, or had lent a sum of money on interest, were to ask him, what rent or what interest have you *taken*? he would be naturally understood to mean what rent or what interest have you agreed to take; or, in other words, what rent or what interest have you *taken* by your *contract*. Certainly, a man is said to take six per cent. interest for his money whenever he lends it upon security at that rate; and so, also, a merchant is said to take a certain price for his goods when he sells them at that price, whether on credit or for cash. I think such an application of the word "*taken*" may well be supported, considering the way in which that word is often used, considering also the absurd consequences to which, by any other construction, it must lead; that in all cases in which securities have been impeached since the act was passed (more than forty years) it has received that construction, and that the legislature by a late statute, which I have cited, give plain evidence that they so understood the act. If there were no other way of avoiding the absurdity, it might be made a question whether we should not read the statute thus, "all

bonds, contracts or assurances, whereupon or whereby a greater interest shall be reserved ; and all bonds, contracts or assurances, whereupon or whereby a greater interest shall be taken, shall be void," &c., thereby giving to the word *and* the effect of a disjunctive. It has been argued against that construction, that we cannot take that liberty with this statute, because it is penal. It is penal only, however, in a mitigated sense as regards this part of the statute, which merely affects the remedy in a civil action, and creates no offence nor imposes any punishment. But I conceive that we should be taking too broad a ground for the principle, if we were to lay it down that *and* cannot be taken disjunctively even in a criminal statute, however obvious the intention may be. (a). It is laid down that a statute which is made for the good of the public, ought, although it be penal, to receive an equitable construction. In the Attorney General *v.* Sudell, Lord Keeper Wright says, "This court will aid remedial laws, notwithstanding they are penal ; not indeed so as to make them more penal, but to let them have their proper effect ; and no statute ought to be construed in such a manner as to be against reason." (b). It is laid down that when words in a statute are expressed plainly and clearly, they ought to be understood according to their genuine and natural signification, unless by such "exposition a contradiction or inconsistency would arise in the statute by reason of some subsequent clause, from whence it might be inferred that the intent of the parliament was otherwise. And this, it is said, holds with respect to *penal as well as other acts*." (c). that is, it holds in respect to the exception as well as to the rule ; and I conceive that the inference of the intent may be as well drawn from a subsequent statute, as from a subsequent clause in the same statute ; for it is an established rule of law, that all acts in pari materia, are to be taken together as if they were one law. (d). And there can surely be no doubt what the legislature meant by the clause in question, when we find them in the statute 7 Wm. 4, ch. 5, reciting "Whereas by law all contracts and assurances whatsoever, for payment of money made for usurious considerations, are utterly void; and the avoidance of negotiable securities, in the hands of bona fide indorsees without notice, is attended with great hardship, and injustice," and then enacting "that no note or bill given upon an usurious consideration in the hands of a bona fide endorsee for value, shall be void ;"—upon the construction which the plaintiff asks us to place upon this act, no such hardship could ever have arisen, for the security would be good until usurious interest had been paid upon it; and as interest and principal are paid together when the note becomes due, it would be of no consequence afterwards, whether the note should be held void or not.

JONES J. By the statute 12th Anne, ch. 16, which was known as the "statute of usury" in England, "all bonds, contracts and assurances, whatsoever, made for the payment of any principal or money to be lent, or covenant to be performed, upon, or for any usury whereupon or whereby there shall be reserved or taken above the rate of five pounds in the hundred, shall be utterly void." When the usury is manifest

(a) Hawkins, Book 2, ch. 25, sec. 102. Str. 253. 3 Rep. 7. 8 Mod. 65. Cro. Car. 71.

(b) Bacon ab. Stat. I. 9. (c) Ib. I. 2.

(d) Lord Aylesbury *v.* Paterson, Doug. 30, 6 B. & C. 454. 7 B. & C. 99.

on the face of the contract, there can, of course, be no doubt of its invalidity: and it is as clearly settled, that every contract founded in usury, is ipso facto void, and can never be rendered valid by any subsequent act of the parties, whether the contract be carried into execution or not. (*a*). And as a contract which is usurious in its inception, cannot be rendered valid by the subsequent act of the parties, so when the contract was originally valid, no subsequent taking of, or contract to take, illegal interest, will invalidate it. In this case, therefore, under the statute of Anne, the original debt exists, but the note taken to secure its payment being founded upon an usurious agreement to pay the sum of twelve pounds per cent., for the forbearance thereof for a year, is void. A contract founded upon usury is void under the statute, but no penalty is incurred till the usurious interest is taken; so when the contract was at first valid, but usurious interest is subsequently paid upon it, the penalty of the statute is incurred, but the contract is not avoided. (*b*). The words of our statute 51st Geo. 3, ch. 9, sec. 6, upon which this question rests, vary from the enacting clause of the statute of Anne in a most material point; they are as follows: "That it shall not be lawful upon any contract, to take directly or indirectly, for loan of any monies, wares, merchandize or other commodities, whatsoever, above the value of six pounds for the advance or forbearance of one hundred pounds for a year, and so after that rate for a greater or less sum or value, or for a longer or shorter time: and all bonds, contracts and assurances whatsoever, whereupon or whereby a greater interest shall be reserved *and* taken, shall be utterly void; and every person who shall directly or indirectly take, accept and receive a higher rate of interest, shall forfeit and lose for every such offence, treble of the value of the monies, wares, merchandize, or other things bargained for." To incur the penalty prescribed in this act, the illegal interest must be *taken* in the same manner as is required by the British statute, before the penalty can be incurred under it. And to invalidate any contract, the illegal interest must not only be reserved, as in the British statute, but must also be *taken*. In the British Act the words are, that the illegal interest shall be "reserved *or* taken," while in our statute the words are, "reserved *and* taken;" and therefore, if this view is correct, no security founded upon an usurious contract would be void unless the legal interest had been paid. And in transactions of this nature in this country, I have in most cases found, when a sum of money has been loaned upon usury, that the illegal interest has been paid in advance, being in the first instance deducted from the amount pretended to be loaned, and the security taken for the full amount. It was probably the intention of the Legislature to place the law in this Province in this respect upon the same footing as in England, and the conjunctive *and* was erroneously substituted for the disjunctive *or*; but in the construction of a statute which makes certain contracts void, and is therefore penal in its character, I think the court is not at liberty to depart from the strict letter of the law, and say that "*or*" and "*and*" are the same, and that when the Legislature say that a contract shall be void where usurious interest is reserved *and* *taken*, the court shall declare it void, when illegal interest is only reserved and not

(*a*) 1 Mod. 69, Shepherd's Touchstone, 63. (*b*) 1 Saund. 294.

in fact taken. In the case of Morris against Mellin (*a*), Lord Tenterden says "It is a general rule in the interpretation of statutes, that an enactment the effect of which is to cut down, abridge or restrain any written instrument, shall have a limited construction." And in the same case, Bayley J. says, "It is a general rule that in order to avoid any written instrument by positive enactment, the words of that enactment ought to be so clear and express as to leave no doubt of the intention of the Legislature." If, therefore, there had been no further legislation upon the subject, I should have felt myself compelled to enforce the contract. But the 7th Wm. 4th, ch. 5, sec. 3, must be regarded as an express declaration that "*by law all contracts and assurances whatsoever, for payment of money made for a usurious consideration, are utterly void.*" I am therefore of opinion, that judgment must be for the defendants.

HAGERMAN, J. concurred with the Chief Justice.

Judgment for defendant.

MONTFORTON v. BONDIT.

A receipt in full is not conclusive evidence of payment, but is a mere admission, which is always susceptible of explanation, in respect to the circumstances under which it was given, and the purposes which it was intended to answer.

The plaintiff sued in assumpsit on the common counts. The defendant pleaded to the count for money lent, (£200), that after the making of the promises &c., and before the suit, he paid to the plaintiff £131 3s. 9d., part of the said sum of £200, in full satisfaction and discharge of the cause and right of action in that count mentioned, and that the plaintiff accepted such payment in full satisfaction and discharge. The plaintiff replied that the defendant did not pay £131 3s. 9d., in full satisfaction and discharge, and that he (the plaintiff) did not accept or receive the same in full satisfaction and discharge in manner and form, &c., and concluded to the country.

The facts were these:—The plaintiff, as executor to the estate of the late Joseph Montforton, had lent to the defendant and to Alexander Montforton £130, and a note was taken for it, payable to Fabien Montforton, in three years, at which time he would come of age. On the 24th of June 1844, the defendant and Alexander Montforton paid on account of this note, £107 10s. 0d., and no more, but a receipt was given at the time for the whole amount, signed by the plaintiff, and expressing that on that day he had received of Gabriel Bondit and Alexander Montforton, £131 3s. 9d., Halifax currency, being the full money advanced by the plaintiff as executor to the late Joseph Montforton, and the words are added "and which I do hereby acknowledge to have received in full." One witness who saw the money paid and counted, said he thought the whole amount mentioned in the receipt was paid—he was the person who drew the receipt; but Fabien Montforton swore positively that only £107 10s. 0d. were then paid; that the receipt in full was given upon Bondit, the defendant, engaging to pay the residue, £10 15s. 0d., at a certain time, and that the receipt was placed in the hands of Alexander Montforton, not to be given to Bondit till all was paid. It was expressly sworn by this witness, that the receipt was not to be used as a discharge

for the whole debt till the balance should be actually paid. Another witness corroborated this statement, except that he swore, that the son of Bondit was to give his note for the small amount still due. It seemed from other evidence at the trial, that after the receipt was given, the plaintiff asked for the note to be made to him, but claimed that it should be for seventy-four dollars and three quarters,—the difference being demanded, as interest; the defendant refused this, contending that no interest was to be charged. The note is silent on that point. Bondit was the person to whom the money was lent,—Alexander Montforton was merely his surety in the note, and before he would pay over to Fabien the £107 10s. 0d., that were paid when the receipt was given, he insisted on being fully discharged. The receipt accordingly was drawn as in full of the note, and confided to him, Bondit agreeing to pay the residue. The £107 10s. 0d., and £10 15s. 0d., would not make up the amount of the receipt; the difference, about £12 10s. 0d., had been paid by Bondit to Fabien Montforton, before he came of age, which the plaintiff was unwilling to allow as a payment, but the final dispute seemed to be about the interest only.

A verdict was taken for the plaintiff, for £10 15s. 0d., subject to the opinion of the court, as to the plaintiff's right to recover under the circumstances, in face of the receipt in full.

Phillpotts for the defendant moved to enter a verdict for the defendant, according to leave reserved at the trial.

Burns shewed cause.

ROBINSON, C. J. There can be no doubt that the verdict must stand, so far as regards the question which has been raised on the receipt. A receipt is a mere admission of payment, which is always susceptible of explanation, in respect to the circumstances under which it was given, and the purposes which it was intended to answer. (a). If the most solemn deed under seal may be restrained in its effect, by shewing that it was only delivered as an escrow, it would be strange, if a receipt could not in the same manner, be made to operate according to the intention with which it was given. Here it is sworn, and not denied either at the trial or on affidavit since, that this receipt was given in order to acquit Bondit and Alexander Montforton of their liability under the joint note, and was given at the instance of the latter, who had signed it as a surety, and who insisted upon his being discharged by any arrangement, which the other parties might come to. The effect was to acquit the two of their joint liability, on receiving under a new contract, the undertaking of one to pay a small part, and receiving cash for the remainder. It is not unusual under such circumstances, upon a change in the nature of a security, to give a discharge against the former security. If Bondit's son, or Bondit himself, had given the note for the £10 15s. 0d., payable at a future day, as was agreed upon, the receipt against the joint note would not have discharged the fresh security, because it could have been proved that the former debt was discharged by the new undertaking merely. But though the new note was not given, it was agreed to be given, and Bondit's undertaking to pay the £10 15s. 0d., given on the same day when the receipt was signed, makes him equally liable upon an account stated, or

for money lent, as he would have been upon his note. It must, in the nature of things, be considered as an undertaking made after the other, though on the same day. He agrees, that in consequence of the plaintiff discharging him and Alexander Montforton on the note, he will undertake to pay alone the balance due upon it: It was in effect a loan to him of so much of the money as had been lent to him and the other. Besides, the receipt, it is sworn, was expressly to be retained by Alexander Montforton, and not to be given up to Bondit till the new note was given: and under those circumstances he cannot use it as a discharge, neither is any obstacle occasioned to the plaintiff's recovery, by the fact that the plaintiff declined afterwards to take the note for the £10 15s. 0d., and wanted one that should include interest. He can nevertheless, recover for money lent or on an account stated, provided the time has expired, when the note for £10 15s. 0d., was to have been made payable.

JONES J., and HAGEMAN J., concurred.

Judgment for plaintiff.

CUMMINGS v. GLASSUP, ET AL.

The clerk to the Commissioners of a turnpike trust, who is empowered to sue for tolls, under 3d Vict. ch. 36, is not a competent witness against the defendants in an action for the tolls, in which he is the nominal plaintiff. Although it is the general rule in the appropriation of payments, where there are two distinct claims to which they can be applied, that the creditor can at any time make the appropriation, when the debtor has not directed the money to be specifically applied, yet, under special circumstances, the law will sometimes make the appropriation, and take the option out of the hands of the creditor.

The plaintiff as clerk to the Commissioners of the Midland District Turnpike Trust, sued the defendants in debt for rent due on two demises of a certain toll gate in the Midland District. The first count is upon a demise stated to be made on 1st January 1843, to these two defendants, to hold for one year. The second count states another demise to the two defendants for a year. The plaintiff makes profert of the second lease, but excuses profert of the first, on the ground that it is in the possession of the defendants. The rent is stated to be made payable every fortnight in advance.

The defendants pleaded non est factum to the first count, and on the second count they paid a sum of money into court, and pleaded payment of the remainder. At the trial the plaintiff was called as a witness—first, to prove that the lease declared on in the first count, was delivered to the defendants, and then to prove its contents and execution, and other matters necessary to sustain the action. It was objected, that he was not competent; but his evidence was received subject to exception. He then proved that the lease mentioned in the first count, was in fact made, not to these two defendants alone, as stated, but to one Darley with them,—stating also that Darley was the actual lessee, and the others his sureties. It was objected that if this lease could be considered as legally in evidence, the variance between its terms as stated and as proved, was fatal. A question further arose in relation to the appropriation of payments. It was shown that Darley was the principal lessee under the first lease, but having become a defaulter in July, 1843, he surrendered his lease and went away; and the commissioners, with his assent, made the second lease to these two defendants, who from thence paid rent from time to

time, sufficient, with the sum paid into court, to discharge all arrears under the second lease; but as they had given no directions respecting the appropriation of these payments, the plaintiff contended that he had a right to set them against the rent due by them and Darley on the first lease—which would leave a sum due by the defendants on the second lease. For the monies paid, after the second lease was given, the plaintiff gave receipts, merely stating that the money was received from Thomas Glassup, on account of rent for toll gate No. 3.

The jury gave a verdict for the defendants, expressing their opinion, that the payments were made by Glassup on the second lease, to which Darley was not a party.

A. *Campbell* for the plaintiff, obtained a rule to show cause why a verdict should not be entered for the plaintiff on leave reserved to that effect at the trial, or why the verdict for the defendants should not be set aside, and a new trial granted, on the law and evidence.

Henderson showed cause.

ROBINSON, C. J., delivered the judgment of the court. We are of opinion, that the verdict was properly rendered for the defendant. As regards the first count, the plaintiff would have been disabled from recovering, on account of the variance in stating the demise to have been made to two persons, when it was in fact made to three; but he was, at any rate, in no condition to prove his case, for he relied on his *own evidence*, though he is a plaintiff on the record, and he made out no case without it; but we consider it to be clear, that the plaintiff could not legally be received as a witness. It is true he had no direct pecuniary interest, and in suing upon the authority contained in the statute, may be regarded in the light rather of a trustee,—but that alone would not make him a competent witness, and he certainly is not made a witness by the 3d Vic. ch. 36, which merely provides that in any action concerning tolls, the toll-keeper, or person acting as such, shall not be incompetent to give evidence, on account of being appointed to collect the tolls; this has no reference to the clerk to the Commissioners, and if it had, still it does not go the length of permitting the plaintiff on record to be examined as a witness. The plaintiff, therefore, did not entitle himself by legal evidence, to recover on the first count. As to the second count, it is admitted, that the defendants were not liable under it, unless the plaintiff can claim as matter of strict right, that he can appropriate the payments, made after the new lease was taken by the two defendants, to the rents which had accrued upon the lease to Darley and the defendants, in which Darley is named as principal or lessee, and these two defendants as his sureties. The question of the application of payments is settled upon this ground, that the party paying, may at the time of payment, direct their application to either of two demands, which the other may have against him, and that when he gives no direction, the person receiving the money, may, at any time, make the application to such of the demands as he may choose, with this qualification that, in some cases, the law under special circumstances, makes the application, raising reasonable inferences as to the intention of the party paying, from the facts of the case. Under the circumstances of this case, aided by the finding of the jury, as to the intention of the defendants, we are of opinion, that these payments are to be credited to the rents accruing on the new lease, for it

was the money of these two defendants alone, and not of Darley, and by the clause of forfeiture in the lease, they would lose their term, by the application which the plaintiff desires to make of it.

Rule discharged.

LEADER v. SMITH.

A judge at nisi prius has the power of making an amendment in the terms of a demise in an avowry in replevin.

Replevin. The defendant avowed as a distress for six months' rent, due on the 1st *October*, 1844, on a demise at a half-yearly rent of 12*l.* 10*s.*, payable on the 1st days of October and April in every year. The plaintiff pleaded in bar non tenuit, and riens in arriere. At the trial it appeared, that the lease had been executed in duplicate. Both leases were produced: one had been in the custody of the plaintiff; the other in that of the defendant. They had been originally drawn so as to make the rent payable half-yearly in advance: the first payment on the 1st day of April then next, and then every six months afterwards during the term. The landlord (the defendant) produced and proved his copy of the lease: the words "in advance," had been struck out, and the first payment was by an interlineation made payable on the 1st day of October, instead of April, as it stood at first, and of which the lines were visible. The tenant (plaintiff) then produced his lease, in which the words, "in advance," were also struck out, and the 1st day of April, being obliterated with the pen, "November" was interlined over it, and not *October*, as in the landlord's lease. By mistake, the defendant avowed for six months' rent, due on 1st of October, which had in fact been paid, and it was for the next half-year, ending in April, that he claimed rent. He moved at the trial to amend his plea, and it was allowed, though the plaintiff strenuously resisted, and denied the power to make such an amendment under the statute. Then it was objected, that the lease which the plaintiff on his part produced and proved, shewed the rent to be due on 1st May, which is the next six months from November, and not in April, as the plea, thus amended, stood. The defendant, however, relied on his part of the lease, in which October was the month named, and not November, as in the lease produced by the tenant, according to which the six months' rent claimed would fall due on 1st April. Both leases were written by the same person, and witnessed and proved on the trial by the same subscribing witnesses, who swore that both were carefully compared and read against each other at the time of execution, and perfectly agreed; the word, October, interlined above April in the landlord's lease, was evidently written on an erasure; some other word had been there. The jury, being under the impression that both leases, as executed, made the rent payable in October and at six months after, that the landlord's lease which he produced to prove his avowry (and which supported his plea as amended) was the correct one, and that any alteration which had been made in the tenant's lease had been made without the assent of the landlord, found a verdict for the defendant.

Henderson, for the plaintiff, obtained a rule to shew cause why the amendment made in the record upon the trial should not be set aside, on

the ground that the judge had no power to make the same, and filing an affidavit of the plaintiff's attorney, that the plaintiff had been prejudiced by it; or why a new trial should not be granted on the law and evidence, and for misdirection; or why the verdict should not be entered for the plaintiff on the second issue, according to leave reserved at the trial.

Kirkpatrick shewed cause.

ROBINSON, C. J.—The conclusion arrived at by the jury seems inconsistent with the appearance of the tenant's lease, but accords with what seems to have been the intention of the parties. With regard to the amendment, the plaintiff does not shew that he was prejudiced by it in his defence; his attorney files an affidavit asserting that he was, but he does not explain how; he does not affirm that the rent to April was paid, though he says he was ready to prove that the rent due in October was paid; he swears, that if the landlord had claimed the rent as due in April, he would have pleaded another plea, but does not state what other plea he would have pleaded (a). The amendment was clearly in the discretion of the judge. If we saw even now that it had operated unjustly, we would grant a new trial, but I see no ground laid for it; the verdict on both issues was properly found for the defendant, I think, on the evidence.

JONES, J., and HAGEMAN, J., concurred.

Rule discharged.

JONES v. SPENCE.

Where a wife, who had been abandoned by her husband for several years, took a lease of some premises without her husband's knowledge, on which the defendant afterwards trespassed, and she brought an action against him in her husband's name: Held, that the action was properly so brought.

The plaintiff declared in trespass for entering his close, being Lots No. 18, in the 5th, and 18 and 19, in the 6th concession of the township of Louth; breaking the gates, fences, &c.; felling and destroying the trees and underwood, viz., fifty oak trees, fifty ash trees, and fifty other trees; and cutting down and taking away the timber, underwood, and branches of trees of plaintiff, and converting them to his own use: 2nd count, for taking and carrying away, and converting, fifty oak trees, fifty ash trees, and fifty other trees, and five hundred rails, &c. The defendant pleaded to the first count, 1st, not guilty; 2ndly, that the close was not the close of the plaintiff; 3rdly, that the plaintiff was not possessed; and 4thly, as to prostrating and taking away the trees, branches, &c., in that count mentioned, leave and license. To the second count he pleaded, 1st, the general issue; 2ndly, that the goods therein mentioned were the goods of the defendant, and not of the plaintiff; and 3rdly, as to all but the taking away the rails, leave and license. The plaintiff replied de injuriâ to both the pleas of license, and took issue on the other pleas. There were two questions raised on the evidence at the trial: the plaintiff had abandoned his wife ten or twelve years ago, and removed from the country; she, for her own support, had leased the premises on which this trespass was charged to have been committed, without the privity of her husband, who had never been in possession of

any part of them, or paid any rent, or had anything to do with them. It was contended, that under these circumstances he could not bring trespass for taking the wood or breaking the close, and that the wife could not for her benefit use his name in the action, which she had done. The other question arose upon the license pleaded: the wife of the plaintiff had bargained verbally to sell the defendant all the elm trees growing in a small field, and to take all the fallen timber, the landlord having agreed to let her have the wood in that field: under pretence of this bargain, the defendant, as it was proved, took oak, hickory, and ash trees also. The plaintiff contended, that the license could not cover the injury: 1st, because it was by parol; and 2ndly, because it extended only to the elm trees, and not to oak, hickory and ash trees. The defendant, on his part, insisted, that if the license were exceeded, it was necessary that the plaintiff should have replied excess. These points having been reserved for the consideration of the court, the jury found a verdict for the plaintiff, and 5*l.* damages.

Eccles, counsel for plaintiff.

E. C. Campbell, counsel for defendant.

ROBINSON, C. J., delivered the judgment of the court. It cannot now, we think, be denied, that, under the circumstances proved here, the possession of the wife must be regarded as the possession of the husband. We must take this to be the case of a British subject residing abroad, having abandoned his wife for some years, but being known to be alive, for he has within a recent period been in the province. Under such circumstances, instead of the wife alone being competent to sue for a trespass to land or goods of which she is in possession, she could not upon this evidence sustain the action: the husband is the person entitled to sue, and his name is properly used. Then the verdict is general, and applies to both counts: the second count is for taking the trees, merely as chattels, which they became as soon as they were severed; and whatever question might be raised as to the necessity of replying excess, in order to prevent the license from being a defence of the trespass for entering the close; it can admit of no doubt that that cannot apply in regard to the effect of the license as an answer to the second count. The plaintiff sues for taking ash trees, oak trees and hickory trees: the defendant, not denying that he took the trees, pleads that he took them by the plaintiff's license, and he shews a license to take elm trees and fallen timber only, and no license to take any of the description of trees which he is charged with taking, and which he admits he did take. Of course, in such a case the license fails wholly.

Postea to plaintiff.

MCKEE v. THE HURON DISTRICT COUNCIL.

Where the plaintiff brought an action of debt on the common counts against the Huron District Council, for compensation awarded to him by a jury, for making a road across his premises, before the formation of the Huron District, and while the land formed part of the District of London, and the Huron District had, after its erection, assumed the payment of the sum awarded, the court held that the action would not lie against the Huron District Council at all, but that even if the council had been responsible, the declaration should have been special.

The plaintiff claims in the action £30, being an amount awarded to him by a jury, for compensation for making a road across his premises before

the formation of the Huron District, and while the land formed a part of the District of London. Since the erection of the Huron District, the amount of this debt has been assumed by it.

The defendants contended for a nonsuit, on these facts appearing at the trial, on the ground that the debt not having been a debt of the Huron District, but of the District of London, at the time of the formation of the District Council, the Council of the Huron District could not become liable for it, or assume it under the 43rd clause of the Municipal Council Act. And that at any rate, such assumption must be in writing, or could not be enforced, as being an engagement to pay the debt of a third party. The defendant also insisted that the declaration should have been special, and not on the common counts. Leave was given to enter a non-suit if the Court should be of opinion that the plaintiff could not recover in this action.

Burns for defendants, moved accordingly.

Eccles showed cause.

ROBINSON, C. J.—I am of opinion, that supposing the plaintiff to have a good cause of action against the Huron District Council, his declaration ought to have been special, setting out the debt due to him by the District of London formerly, under the award, that it continued unpaid when the District of Huron became a separate district, in respect of a claim for damages for a highway made across his property, within a township now forming part of the District of Huron, and also continued unpaid when the District Council Act passed, and he should then bring the claim, if he could, under the 43rd clause of that statute. But upon the question whether the District of Huron is liable for this debt, it appears to me that it is not; I cannot derive such liability from any thing contained in the District Council Act, or in the act constituting the county of Huron a separate district, 1 Vic. ch. 26. The 13th section of that statute makes against such a claim, for it provides that the justices of the London District, retaining for the use of the district generally, such portion of the rates raised in the county of Huron, as may be in proportion to the ordinary charges of the district, shall pay over to the new district, when it shall be proclaimed, any amount beyond that, which amount might be applied towards building a gaol and court-house. I see nothing to make this debt due by the District of London to the plaintiff, a charge against the District of Huron, and therefore nothing to make it a debt which the Council must be taken to have assumed, under the 43rd clause referred to.

JONES, J., and HAGERMAN, J., concurred.

Rule absolute.

DENHOLM v. THE COMMERCIAL BANK, M. D.

The tenant of a mortgagor, holding under a lease for years, during the continuance of his term, attorned to the mortgagees, and after the term expired continued to hold the premises from the mortgagees, as a yearly tenant, and when his tenancy ceased, claimed from them certain shelves and boxes with which he had fitted up a shop on the premises during the continuance of his lease from the mortgagor, and which were not fixtures, and for which, upon the mortgagees' refusal to part with their possession, he brought trover.—Held, that the action was maintainable.

Trover for shelves, boxes, &c., being the fittings up of a merchant's shop. The defendants pleaded the general issue, and that the plaintiff

was not possessed of the goods, &c. The plaintiff had taken a lease from one Ross of a building in Toronto, and had fitted it up with shelves, boxes, counter, &c., and it was proved that these were put up so as not to constitute fixtures, being detached from the walls and unfastened. Before the term was out, Ross's estate in the premises was acquired by the defendants, to whom the plaintiff attorned, and paid rent, continuing in possession till the 1st May last, without making any new agreement with them. It appeared that the plaintiff's lease from Ross was for a term of five years, commencing 1st January, 1837, and that it expired consequently on 1st January, 1842; that before that time the defendants became mortgagees from Ross of the premises, and that the plaintiff, by agreement from time to time with them, occupied the premises till 1st May, 1844. The defendants conceiving that the shelves, &c. were fixtures, had detained them. The learned judge directed the jury to find for the plaintiff, and a verdict was rendered accordingly for 52*l.* 3*s.* 9*d.*, leave being reserved to the defendants to move for a nonsuit.

Burns, for the defendants, moved for a nonsuit accordingly, or for a new trial on the law and evidence.

Crooks shewed cause.

ROBINSON, C. J., delivered the judgment of the court.—We are of opinion, that this rule must be discharged. It is clear that the defendants, as the mortgagees of Ross, hold no other right as regards the plaintiff, than Ross would have held. It is true that the plaintiff, having attorned to the defendants upon their taking the mortgage, continued to hold under them after his term from Ross had ended; but there is nothing to shew that he held upon any new agreement, which could affect his right in regard to these shelves. It is not the question here, whether, after the term was ended the plaintiff could have entered upon the premises to remove the things, for it is the plaintiff who is suing, relying singly on his right of property, and the parties have, by their written admissions entered into when the term was about expiring, placed the question singly upon the plaintiff's right to the shelves, &c. Upon the evidence, they were not fixtures; there can therefore be no reason why the plaintiff should not recover the value of his goods detained by the defendants, who shew no right to them by any transfer or agreement. *Davis et al. v. Jones et al.*(a) is precisely such a case as the present. Those cases cited in the argument,(b) which only go to shew that trover cannot be maintained for fixtures, or that the tenant who might have removed certain fixtures during the term, cannot enter afterwards for the purpose of doing so, have no application to the present case.

Rule discharged.

ECCLESTONE *v.* JARVIS, SHERIFF.

A tenant in common of goods, which have been sold under an execution against his co-tenant, as such co-tenant's absolute property, cannot maintain trover against the sheriff who sold them, to recover the value of his share or interest in them.

Trover for goods and chattels. Plea, not possessed. At the trial, it was proved that an execution was placed in the defendant's hands, at the

(a) 2 B. & Al. 165.

(b) 4 N. & M. 211; 2 Ad. & El. 167; 3 Tyr. 974.

suit of one McConkey, against the goods of Edward Ecclestone, a brother of the plaintiff, and that under it, the defendant seized and sold goods to a large amount, which the plaintiff claimed to have an interest in, as tenant in common with his brother. It was proved that the principal part of the goods had been purchased by the brothers jointly from McConkey, and that it was for their price that the judgment had been entered at the suit of McConkey, and the execution issued under which they had been seized. It appeared that the plaintiff had joined Edward in promissory notes given for the price of the goods; but the weight of evidence, notwithstanding this, went to establish that he had no interest in the goods, for, even after their seizure, he had frequently declared that he had no interest in them. The plaintiff contended that he was entitled to recover the value of his share, and the learned judge having left it to the jury under the evidence to say whether the goods were the joint property of the brothers, or solely of Edward, they found that they were jointly interested in them, and gave a verdict and damages for the plaintiff £155 1s. 9d.

Against this verdict, as contrary to law and evidence, a rule nisi was obtained by *Boulton, Q. C.*, counsel for defendant.

Eccles showed cause.

ROBINSON, C. J., delivered the judgment of the court.—If the verdict were not contrary to law, we should be much inclined to interpose on the other ground stated in the rule, and to grant a new trial upon the evidence, for it certainly seems to preponderate in favour of the defendant. But on the question of law, we have no doubt, and the rule for setting the verdict aside, must be made absolute. When the sheriff in such a case is aware, that the goods which he is about to sell in execution to satisfy the debt of an individual, are, in fact, the joint property of that person and another, his proper course is, to sell no more than the interest which the defendant has in the goods, and then the vendee is not deceived, but knows exactly what is purchased. Here the sheriff could hardly be expected to take that course, for he might well, upon the evidence, have been sincerely under the impression, that the goods belonged to the defendant solely. But his having sold the goods absolutely, and not the defendant's part interest in them only, cannot affect the right of this plaintiff, if he really has an interest in the goods; he is placed in no worse situation, because the sheriff has made a mistake, being unaware of his interest; that will still, nevertheless, remain in him, and he will be a tenant in common of the goods with the vendee, just as he was before with his brother, supposing that he really had the interest which he pretends to have. The possession of the sheriff's vendee is no conversion. He holds according to his interest, as a plaintiff in ejectment holds according to the truth of his title, when he has recovered possession under the writ of *habere facias* (*a*).

Rule absolute.

HAVENS v. DONALDSON.

An award made under the Boundary Line Commissioners' Act, 1 Vic. ch. 19, on a subject within the jurisdiction of the Commissioners, and in which both parties interested were heard, and which had not been appealed against, held to be conclusive between those parties.

Trespass quare clausum fregit, being the north end of lot seven, in

(*a*) *Watson on Partnership* 98; *Cowper.* 450; *4 Vesey Jun.* 397.

the 2nd concession of the township of Grantham, the locus in quo being so described as to embrace the whole width, and about 100 links in depth of the north end of the lot. Pleas, general issue, and justification as a public highway. Issue thereon. It was a question of boundary. The plaintiff relied on an award of the Boundary Line Commissioners, made 31st Oct., 1839, between the defendant and himself, the defendant having been the claimant, and the application to the Commissioners having been to ascertain and determine the boundary between lots 7 in the 1st and 2nd concessions of Grantham, being the lots of the plaintiff and defendant, there being a public allowance for road between these lots, constituting the line between the 1st and 2nd concessions. The Commissioners, by their award, declared that having examined the ground and heard the evidence, they were satisfied that eastward of lot 9, no original monuments could be traced, either on the concession line between the 1st and 2nd concessions, or in front of the first; that they found an undisputed post at the south east angle of lot 7 in 4th concession, and allowing 51 chains and 28 links from the bank of lake Ontario, which would give a chain for a road, and the full allowance of a lot as mentioned in the patents, they placed a post there, at the distance of 156 chains and 84 links, from the undisputed monument upon the 4th concession, which allowed to the 2nd, 3rd and 4th concessions, the same width of 52 chains and 28 links, including one chain for each road allowance. They then proceeded from this post, planted by their surveyor under their direction, at the south-east angle of the defendant's lot, and ran a line for the southern limit of his lot, according to which the locus in quo belonged to the plaintiff. It was proved that both parties attended before the Commissioners, that the defendant expressed himself satisfied with the monument thus set to mark his boundary, and wished to have a proper inscription placed upon it, and though he afterwards took steps to appeal from the award, he did not proceed in the appeal, but abandoned it. The defendant contended he was not bound by the award, 1st, because it was not competent for the Commissioners to proceed as they did, and taking the space south of the 4th concession, to divide it into equal spaces, and thus attempt to establish concession lines, for that, though this rule is given by the statute for fixing the side lines or limits between lots, it cannot be applied as a rule for determining the ends of lots, or in other words, concession lines; 2nd, that parties interested in the several concessions were not summoned, and therefore the matter was *coram non judice*; 3rd, that the matter was *coram non judice*, because the defendant was not, at the time of his petition being heard, the owner of the fee, but acquired his title some time afterwards. The learned judge, however, considered the award conclusive, and the jury found a verdict for the plaintiff, and £25 damages.

Boulton, Q. C., obtained a rule nisi, for a new trial, on the ground that the verdict was against law and evidence, and for mis-direction.

E. C. Campbell shewed cause.

ROBINSON, C. J., delivered judgment.—We are of opinion, that the verdict was properly rendered for the plaintiff. The Boundary Line Commissioners had, by the statute, (a) undoubted authority to determine the rear boundary of the defendant's lot, as well as the side lines; for the

statute says expressly, that they may determine "all matters of dispute, touching any line or lines, boundary or boundaries, of any township, concession, or lot;" and further, it makes their decree, when unappealed from, final between the parties. That the parties in this cause were parties to the proceedings before the Commissioners, there can be no question, and more especially the defendant, because it was upon his application that they acted. It does not, therefore, appear to us, that there is any question as to the award being binding upon him; whether it will have any, and what effect, upon the interests of other persons, who were not made parties to the proceedings, it will be time to determine, when any such persons are affected by it, and desire to have the judgment of the court upon that point. If it were clear to us that the Commissioners, in their method of fixing the boundary in question, had proceeded in disregard of the positive provisions of any statute, we are not prepared to say, as regards these parties, that the decree would nevertheless, not be binding, if they acquiesced in it, and forbore to appeal from it, within the period limited by the act. The words of the act are in that respect express and positive, and there would be no other hardship in holding these parties concluded, if they omitted to appeal, than such as may repeatedly happen, when upon a trial at common law, a verdict is rendered in misconception of the law, against which, however, the party injured omits to move in due time. But without now deciding whether the award would be final, as regards these parties, in the case supposed, we have come to the conclusion, that no such question arises here, for there was no law restraining the Commissioners from ascertaining and fixing, as they did, the rear boundary of the defendant's land, and thus, in effect ascertaining the front boundary of the plaintiff's lot, since it is plain that they were to be separated only by an allowance for road, of one chain in width. If, indeed, it were proved, to their satisfaction, that the concession lines had been laid out upon the ground, in that portion of the township, and if those lines could be traced, then they should undoubtedly have been governed by them, and not have assumed the right to alter them; but finding no trace or clear proof of the original survey, they were called upon to fix the line, and they could not have proceeded to do so, by a more equitable and reasonable rule. It did equal justice to both parties; gave to each as much land as his patent entitled him to expect, and it followed the method devised and sanctioned by the Legislature, for ascertaining the side lines of lots, where no trace of the original survey at the particular point, can be found. With respect to other parties not having been summoned, who may possibly be affected by the decree, that could not make it less binding on those who were heard, and especially on this defendant, at whose instance the whole proceeding took place. With regard to the remaining objection, that the defendant was not the owner of the fee in this land, at the time he petitioned the Commissioners, not having acquired his title by deed until afterwards, it need hardly be said that he cannot be allowed to use such an argument against the validity of the award. He set the Commissioners in motion by his petition, in which he claimed to be the owner of the fee, and it would be strange, if after expense has been incurred, half of which, the plaintiff has been compelled to bear, by the decree, he should be permitted to evade the consequence of the proceeding, by setting up the untruth of his own allegation.

Rule discharged.

DOUGALL v. MOODIE, SHERIFF.

A plea of justification under a writ of *fi. fa.*, in trespass for taking goods, is bad, if it state the writ to have issued before judgment was entered. Since the new rules, which require the judgment to be entered of a particular day, the issuing of the writ upon it, should be averred of the day it actually issued, with the statement "tested of" the day in term on which it is tested.

The plaintiff declares, for that whereas the plaintiff heretofore, to wit, on the 5th day of March, in the year of our Lord 1844, in the court of our said Lady the Queen before the Queen herself, at Toronto in the Home District, by the consideration and judgment of the same court recovered against one William Parker, the sum of 103*l.* 7*s.* 2*d.*, which was adjudged to the plaintiff for his damages by him sustained, as well on occasion of the nonperforming of a certain promise and undertaking before then made by the said William Parker to the plaintiff, as for his costs and charges by him about his suit in this behalf expended, whereof the said William Parker was convicted, as by the record and proceedings thereof still remaining in the same court of our said Lady the Queen before the Queen herself at Toronto aforesaid, will more fully appear. And the plaintiff further saith, that the said judgment being in full force, and the said damages remaining unpaid and unsatisfied, the plaintiff, on the 17th day of February, in the 7th year of the reign of our said Lady the Queen, for the obtaining of satisfaction thereof, sued and prosecuted out of the said court of our said Lady the Queen before the Queen herself at Toronto aforesaid, a certain writ of our said Lady the Queen called a *fieri facias*, directed to the sheriff of the Victoria District, by which said writ, our said Lady the Queen commanded the said sheriff, that of the goods and chattels of the said William Parker, in the said sheriff's district, he should cause to be made the damages aforesaid, and that he should have that money before our said Lady the Queen at Toronto, on the first day of Trinity Term then next, to render to the plaintiff for his damages aforesaid, and that the said sheriff should have then there that writ, which writ, afterwards, and before the delivery thereof to the said sheriff as hereinafter mentioned, to wit, on the 17th day of February, in the 7th year of the reign of our said Lady the Queen, was duly endorsed with a direction for the said sheriff to levy the sum of 79*l.* 5*s.* 7*d.*, the interest on the sum of 75*l.* 18*s.* 5*d.* from the 19th day of February in the year of our Lord 1844, 1*l.* 2*s.* 6*d.* for that writ, 1*s.* 6*d.* for postage, and his own fees, and which said writ so endorsed, afterwards, and before the execution thereof, to wit, on the said 17th day of February, in the 7th year of the reign of our said Lady the Queen, was delivered to the now defendant, who then and from thence until and at and after the execution of the said writ was sheriff of the said Victoria District, to be executed in due form of law. By virtue of which said writ, the defendant, so being sheriff of the said Victoria District as aforesaid, afterwards, to wit, on the day and year last aforesaid, and within his district as such sheriff as aforesaid, seized and took in execution divers goods and chattels of the said William Parker, of great value, to wit, of the value of the monies so endorsed and directed to be levied as aforesaid, and then levied the same thereout. Yet the defendant, so being such sheriff of the said Victoria District as aforesaid, not regarding his duty as such sheriff, but contriving and wrongfully

and unjustly intending to injure, prejudice, and aggrieve the plaintiff in that behalf, and to deprive him of the said monies so endorsed on the said writ and directed to be levied as aforesaid, and of the means of obtaining the same, had not the said monies so levied as aforesaid, or any part thereof, before our said Lady the Queen at Toronto aforesaid, according to the exigency of the said writ and of the said endorsement so made thereon as aforesaid, but therein wholly failed and made default, nor hath he paid the said sum of $79l. 5s. 7d.$, the interest on the sum of $75l. 18s. 5d.$ from the 19th day of February in the year of our Lord 1844, $1l. 2s. 6d.$ for that writ, $1s. 6d.$ for postage, or either of them, or any part thereof to the plaintiff, and the now defendant, after the said levy, to wit, on the first day of Trinity Term then next, falsely and deceitfully returned to the said court of our said Lady the Queen, upon the said writ, that the said William Parker had no goods or chattels in his district whereof he could cause a levy to be made as he was commanded, as by the said writ and return thereof remaining of record in the said court of our said Lady the Queen before the Queen herself, fully appears. By means of which premises, the plaintiff hath been and is greatly injured, and deprived of the means of obtaining the said monies so endorsed as aforesaid, and which are still wholly unpaid, and is likely to lose the same. Second count.—And whereas also the plaintiff heretofore, to wit, on the 5th day of March, in the year of our Lord 1844, in the court of our said Lady the Queen before the Queen herself at Toronto in the Home District, by the consideration and judgment of the same court, recovered against one William Parker the sum of $103l. 7s. 2d.$, which were adjudged to the plaintiff for his damages by him sustained, as well on occasion of the non-performing of a certain promise and undertaking before then made by the said William Parker to the plaintiff, as for his costs and charges by him about his suit in that behalf expended, whereof the said William Parker was convicted, as by the record and proceedings whereof still remaining in the same court of our said Lady the Queen at Toronto aforesaid, will more fully appear. And the plaintiff further saith, that the said judgment being in full force, and the said damages remaining unpaid and unsatisfied, the plaintiff, on the 17th day of February, in the 7th year of the reign of our said Lady the Queen, for the obtaining of satisfaction thereof, sued and prosecuted out of the said court of our said Lady the Queen before the Queen herself at Toronto aforesaid, a certain writ of our said Lady the Queen called a fieri facias, directed to the sheriff of the Victoria District, by which said writ our said Lady the Queen commanded the said sheriff, that of the goods and chattels of the said William Parker in the said sheriff's district, he should cause to be made the damages aforesaid, and that he should have that money before our said Lady the Queen at Toronto aforesaid, on the first day of Trinity Term then next, to render to the plaintiff for his damages aforesaid, and that the said sheriff should have then there that writ, which said writ, afterwards, and before the delivery thereof to the said sheriff as hereinafter mentioned, to wit, on the day and year last aforesaid, was duly endorsed with a direction for the said sheriff to levy the sum of $79l. 5s. 7d.$, the interest on the sum of $75l. 18s. 5d.$ from the 19th day of February in the year of our Lord 1844, $1l. 2s. 6d.$ for that writ, $1s. 6d.$ for postages, and his own fees, and which said writ so endorsed, afterwards, and before the said execution

thereof, to wit, on the said 17th day of February, in the 7th year of the reign of our said Lady the Queen, was delivered to the now defendant, who then and from thence until and at and after the execution of the said writ, was sheriff of the said Victoria District, to be executed in due form of law, and although there then and afterwards and whilst the said last mentioned writ remained in full force, were divers goods and chattels of the said Wm. Parker, within the district of the now defendant as such sheriff as aforesaid, whereof he could, and might, and ought to have levied the monies so endorsed and directed to be levied, as last aforesaid, whereof the defendant during all that time aforesaid had notice; yet the now defendant, so being sheriff of the said Victoria District, not regarding the duty of his office as such sheriff, but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve, the now plaintiff in this behalf, and to deprive him of the monies so endorsed on the said last mentioned writ, and directed to be levied as last aforesaid, and of the means of obtaining the same, did not, nor would within a reasonable time for that purpose, which hath long since elapsed, levy the money last aforesaid, or any part thereof, but wholly neglected and refused so to do, and therein failed and made default, and afterwards, to wit, on the first day of Trinity term then next, falsely and deceitfully returned to the said court of our said lady the Queen, that the said William Parker had no goods or chattels in his district, whereof he could cause a levy to be made as he was commanded, as by the said last mentioned writ, and the return thereof, remaining of record in the said court of our said lady the Queen before the Queen herself. By means of which premises, the plaintiff hath been, and is greatly injured and deprived of the means of obtaining the said monies, so endorsed on the said writ, and directed to be levied as aforesaid, and which are still unpaid, and is likely to lose the same. The defendant demurs specially to the first count, because the plaintiff alleges that he issued a writ of fieri facias, on the seventeenth February, in the 7th Victoria, to have satisfaction of judgment obtained on the 5th March, 1844, a period subsequent to the issuing of *fi. fa.* And that the writ of fieri facias, is alleged to have been delivered to defendant on the 17th of February, 1844, when the judgment was not obtained till the 5th of March subsequent; and to the same count, because the writ of fieri facias is alleged to have been issued on the 17th February, to have satisfaction of judgment obtained on the 5th March following, which is inconsistent and impossible; and that the writ of fieri facias is alleged to have been delivered to defendant on the 17th of February, when judgment was not obtained till 5th of March following. And to the second count, because it alleges that the writ of fieri facias, after delivery to defendant, was endorsed, &c., who, at the time of the delivery and endorsement, and after the execution of the writ, was sheriff, &c.; and then states that defendant did not, nor would, levy the money on said writ, which is inconsistent and repugnant, because it states that defendant after execution of the writ was sheriff, and then states that defendant did not execute at all. Because the defendant had until the first day of Trinity term, 1844, to execute the writ of fieri facias; and yet the plaintiff states that he did not execute it within reasonable time, and he shews that William Parker had goods, &c., of which defendant had notice, till return of the writ, viz. till Trinity

Term, and it is not stated that defendant did not execute before return day of the writ. Joinder in demurrer.

Brooks, counsel for plaintiff.

John Ross, counsel for defendant.

ROBINSON, C. J., delivered the judgment of the court.—We apprehend that in this country, as in England, before the late statutes passed there about the entry of judgments, and immediate execution, the averring a judgment to be entered out of term is erroneous, (a) and must be so held if excepted to, (b) but this is not the objection taken here, the fault pointed out is, that there is an inconsistency in averring that the plaintiff, on 17th February, 1844, took out execution on a judgment entered on the 5th March following. It is clear that that is bad on special demurrer, and in the first count, the time is not even laid under a scilicet, but it is stated, positively, that the plaintiff, on the 17th February, took out a writ of *fi. fa.* upon the judgment entered on 5th March, without even the allegation that he sued it out “afterwards,” so that the repugnancy stands wholly without relief. The actual time of suing out the writ might have been stated thus, “that on, &c., the plaintiff sued out the writ tested as of, &c.,” and then there would have appeared no inconsistency. The second count is also bad on special demurrer, for the same cause. It is unnecessary to consider the other causes of demurrer to this count, but the plaintiff should so amend his declaration as not to leave ground for such exceptions.

Leave to the plaintiff to amend on payment of costs, otherwise
Judgment for defendant.

ABRAMS v. MOON.

Where, in trespass de bonis asportatis, the defendant pleaded property in himself, giving the plaintiff color, and the plaintiff replied stating property in himself at the time of the trespass, by purchase from the defendant, the replication was held bad on special demurrer.

The plaintiff declares in trespass for seizing, taking, and leading away certain cattle and chattels of the plaintiff. The defendant pleads, that before the said time when, &c., to wit, on the 9th day of May in the year last aforesaid, he, the defendant, was lawfully possessed as of his own property of the cattle, goods and chattels, in the said declaration mentioned, and being so possessed, the defendant, on the day and year last aforesaid, delivered the said cattle, goods and chattels to one Richard Roe, to be kept by the said Richard Roe to and for the use of the defendant, and the said Richard Roe, afterwards, and before the said time when, &c., delivered the said cattle, goods and chattels to the plaintiff, whereupon the defendant, at the said time when, &c., took the said cattle, goods and chattels from and out of the possession of the plaintiff, as he lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiff in that behalf, which are the same alleged trespasses and conversion in the said declaration mentioned. And this the defendant is ready to verify. The plaintiff replies, that the defendant, being so possessed of the said cattle, goods and chattels as in that plea mentioned,

(a) 5 B. & Ad. 70.

(b) 3 B. & C. 316.

afterwards, and before the said time when, &c., and before the commencement of this suit, to wit, on the 9th day of May in the year last aforesaid, for a valuable consideration, sold and delivered the said cattle, goods and chattels to the said plaintiff, whereby the said plaintiff then became and was possessed of the same cattle, goods and chattels as of his own property, and the plaintiff being thereof so possessed, the defendant afterwards at the said time when, &c. in the said declaration mentioned, of his own wrong committed the trespasses in the said declaration mentioned, in manner and form as the plaintiff hath above thereof complained against him, and this he is ready to verify. The defendant demurs specially, because the said replication is argumentative, and does not expressly traverse or deny, or confess and avoid, but only denies by implication, that the defendant, at the time when, &c., was lawfully possessed of the said cattle, goods and chattels in the said plea mentioned; and also for that the said replication is double, in stating that the plaintiff became and was possessed of the said cattle, goods and chattels in manner therein stated; and also that the defendant of his own wrong committed the trespasses in the declaration mentioned; and also for that the said replication states that the defendant of his own wrong committed the trespasses in the declaration mentioned, but does not deny that the defendant had such cause as in the third plea mentioned; and also for that the replication concludes with a verification.

Crooks, counsel for plaintiff.

Hagarty, counsel for defendant.

ROBINSON, C. J.—The defendant in this cause has pleaded a plea with a fictitious statement of facts, in order to give express color to the plaintiff's action, a method of pleading almost confined to actions of trespass quare clausum fregit; and much more in use formerly in those cases than now. We are sometimes told indeed, that it is not applicable to actions for trespasses of this nature, and it has been in all cases a question whether, since the new rules of pleading, it is competent to a defendant to resort to this kind of defence. In the case of *Morant v. Seger*,^(a) however, it was sustained, and certainly there seems nothing in the new rules of pleading to make it less admissible now than before. The object of it is, to leave the affirmative of the issue with the defendant, while in effect the defendant does nothing more than negative the plaintiff's right to the goods, which is indispensable to support his action. If the defendant having really no regard to any thing but the truth of the case, had pleaded a simple denial that the goods were the property of the plaintiff, he would have done all that he does in substance by this plea; but in order to raise a new issue, of which he should take the affirmative upon himself, and the plaintiff the negative, he does not merely deny the plaintiff's right, which is all he need have done, but he sets up a title in himself at the time of the trespass; and in order to escape the fault of argumentativeness, and pleading a plea liable to the exception of merely amounting to the general issue, for the goods could not at one and the same time have been the goods of the plaintiff and defendant, he sets up this fictitious pretence of the plaintiff having obtained the goods by the fraudulent delivery of his bailee, thereby giving color to the plaintiff to call them his own, inas-

much as he obtained them in a manner not wrongful, and such as would entitle him to hold them against all but the true owner. This method of pleading throws it upon the plaintiff, either to confess and avoid the defendant's alleged right of property, or to deny it, for it is settled clearly that he cannot merely traverse the statement of the supposed bailment to Richard Roe, and the delivery by the bailee to himself; these being statements which it is said he must know to be fictitious, and therefore cannot be permitted generally to deny them, and moreover the denying them would only, as it is said, make his case so much the worse, because then he would be admitting the only fact material for the defendant, namely, that the goods are his, and traversing only that which gave a color of right, though it could do no more under such circumstances, to himself. It then only remains to consider, whether the plaintiff has in his replication either confessed and avoided the defendant's plea of property in himself, at the time of the trespass, or has sufficiently traversed it, for the whole object of the plea is to compel him to do one or the other. It seems that instead of doing either in his replication, he sets forth a new fact, shewing that the goods were his at the time of the trespass, namely, by purchase from the defendant, which is only denying argumentatively the substance of the plea, which affirmed the goods to be at that time the property of the defendant. Stripping the plea of its fictitious statements introduced for the purpose of giving color, it contains only an assertion, that at the time of the trespass the goods were the defendant's. The plaintiff answers, not by traversing that statement in direct terms, but by relating how he himself acquired them, and how they became his at the time of the trespass, which is only meeting one affirmative by setting up another inconsistent with it. It seems, therefore, to be bad, for the cause first assigned as a ground of demurrer; it ought merely to have denied that the goods were the defendant's at the said time when, &c., and concluded to the country. It is rather a mortifying reflection, that one is compelled at this day to go gravely into questions arising out of this solemn trifling with the administration of justice, and I confess, I cannot but regret the time so employed. But this is the conclusion which, by following those who are learned in such subtleties, we appear to have arrived at, and our judgment, therefore, is for the defendant on the demurrer.

JONES, J.—The replication is bad. The plaintiff does not confess and avoid, or deny the facts stated in the defendant's plea, but alleges that the defendant sold the cattle to the plaintiff, and then took them from him.

HAGERMAN, J., concurred.

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Judgment for defendant.

BROWN v. ROBERTSON.

It is not sufficient to excuse the profert of a deed, to allege that it is in the possession of a third party, who refuses to produce it or deliver it to the plaintiff.

Covenant for nonpayment of rent, reserved by indenture, which the plaintiff excuses profert of, by averring that it is in the possession of a third party, of which the defendant had notice, and that such third party

refuses to produce it, or to deliver it to the plaintiff. Special demurrer, because no sufficient excuse for not making profert is alleged. Joinder in demurrer.

A. Wilson, counsel for plaintiff.

Ewart, counsel for defendant.

ROBINSON, C. J., delivered judgment.—We are of opinion that the excuse offered by the plaintiff, for not making profert of the deed mentioned in his declaration, is not sufficient. The third party may decline to produce it, only because he is not commanded by subpoena duces tecum to do so, or because no proper order has been obtained by the plaintiff.

— Judgment for defendant.

DEE v. CAVANAGH.

Where in an action against the maker of a promissory note, he pleaded that he made another note to the plaintiff for a larger sum, which the plaintiff accepted in full satisfaction, (*among other things*), of the note declared on, and the plaintiff replied (admitting the making and delivery of the second note), that the defendant did not deliver, and he did not accept the same “in full satisfaction and discharge of the note declared on, (*amongst other things*),” as by the defendant alleged. The replication was held good on special demurrer.

The plaintiff declares in assumpsit, against the defendant, as the maker of a promissory note for fifty pounds.

The defendant pleads that after this note became due, he made and delivered to the plaintiff another promissory note for seventy-six pounds, two shillings and six pence, which the plaintiff accepted in full satisfaction and discharge of (*amongst other things*) the note in the declaration mentioned.

The plaintiff replies (admitting the making and delivery of the second note), that the defendant did not deliver, and that he did not accept the same “in full satisfaction and discharge of the said note in the declaration mentioned (*amongst other things*),” as by the defendant is alleged.

The defendant demurs to this replication, as being only an argumentative traverse of the delivery and acceptance of the second note in satisfaction, and because it is a negative pregnant.

Burns for plaintiff.

Eccles for defendant.

ROBINSON, C. J.—If a plaintiff setting out a will, should state that the testator did “among other things devise,” &c., stating the devise or bequest on which he founds his action—could not the defendant say that the testator did not “among other things devise”? and would an issue so taken be considered to make it necessary for the plaintiff to prove any thing more than the devise on which he relied? The substance of the issue here is whether the plaintiff accepted the second note in satisfaction of the first; whether other things also were satisfied by the note is wholly immaterial to this action. The plaintiff ought properly to have confined his denial to the satisfaction of the note; by going further he seems to tender an issue upon what is immaterial, namely, whether other things were not agreed to be discharged, as well as the note sued on; but the defendant has no reason to complain of the plaintiff following his own unnecessary mode of statement. (a).

Modo et formâ, only put in issue material allegations in the plea, and this falls I think, within that principle, that is, the note was not accepted in satisfaction, as the defendant has alleged, viz. in satisfaction of the first note and other things. It has been lately laid down by high authority in England, (a), that the true test of a plea being objectionable or not, as containing a negative pregnant, is to consider whether, if the negative and implied affirmative were both plainly expressed, the plea would be bad for duplicity. Now here, if the plaintiff had replied in direct terms, that he had not accepted the second note in satisfaction of the first, and had not accepted it in satisfaction of any other things as mentioned in the plea, the replication would not have been bad for duplicity, because the latter would have been merely a denial of an idle immaterial statement, which could not constitute a defence, and utile per inutile non vitiatur. It may be true that the negative here is pregnant with an affirmative, but it is an affirmative of insignificant matter, which cannot hurt, for it has not even the appearance of resting the case on a double defence. It is laid down as the principle on this subject, that when the affirmative implied in the negative is not sufficient to maintain the adversary's pleading, a negative pregnant cannot be objected to, even on special demurrer. (b). It is said an "issue shall not be taken upon a negative pregnant, which implieth another sufficient matter." (c). I am of opinion that the replication is good, and that the plaintiff should have judgment.

JONES, J., and HAGEMAN, J., concurred.

CARSWELL v. HUFFMAN.

If an action be brought against a person, who is a magistrate, for an act done, as he alleges, in the execution of his duty, and it be doubtful whether it was so done or not, and no notice of action is proved, it is proper, in order to determine whether he is entitled to such notice, that it should be left to the jury to say, whether he believed he was acting as a magistrate or not, and if they find in his favor on that point, the verdict must be against the plaintiff.

Trespass for assault and false imprisonment. Plea, general issue by statute. At the trial, it appeared that the defendant was a Justice of the Peace of the Midland District; that on the day of the alleged assault, a person, who was passing the plaintiff's house, saw the defendant and his son there; the furniture of the house was in disorder; the defendant called the witness and his son to tie the plaintiff, and he was bound with cords, by the defendant's desire, and sent many miles in a sleigh to gaol, without a warrant, or any thing else, to show the cause of his commitment: the gaoler, in consequence, refused to receive him, and by the advice of a magistrate in Kingston, those who had him in custody, discharged him. No information was proved to have been taken by the defendant, or by any one, charging the plaintiff with any offence, nor was it shown that there had been any complaint made against him, or that any thing had been stated to the defendant, or had occurred in his view, which could justify an arrest of the plaintiff; but the witness who proved the fact of the plaintiff's being tied and sent to gaol, stated that he had heard before he went to the house, rumours of a disturbance between the plaintiff and

(a) *Bell v. Tuckett*, 1 Dowl. N. S. 458. (b) *Arch. Plead.* 191.
(c) *Co. Lit.* 126.

his wife, and that the plaintiff had threatened to stab her ; whether the defendant had heard these rumors or not did not appear. He commanded this witness to assist him in the Queen's name, and the witness swore that he believed that the defendant thought that he was discharging his duty as a justice of the peace. This was all the evidence given to shew the capacity in which the defendant acted, but the plaintiff's counsel, in opening his case to the jury, stated that the defendant was a magistrate, and that he supposed he thought he had a right to do what he did, in that capacity. There was no notice of action proved, and a nonsuit was moved for on that ground, because the defendant, having acted as a justice of the peace, was entitled to that protection. The learned judge declined to nonsuit, but left it to the jury to say whether, in their opinion, the defendant believed that he was acting in the matter as a justice of the peace, reserving leave to the defendant, if they should so find, to move for a nonsuit in term.

Kirkpatrick, for defendant, moved accordingly.

Henderson shewed cause.

ROBINSON, C. J.—We are asked to non-suit the plaintiff, because he acted as a justice of the peace on the occasion complained of, and because notice of action was not given to him. Whatever may have been really the circumstances under which the defendant acted, and whatever may have been the defendant's reason for keeping from the view of the court and jury anything which it may have been in his power to have proved, there really is such a total absence of any ground in the evidence for believing that the defendant could have been under the impression that he was called upon to exercise any duty of a magistrate, that, I confess, I do not see why the jury should have said that he did act under that impression ; they must have known, or perhaps only suspected something, that was not in evidence. All that was proved was, that the defendant was a magistrate, and went into the plaintiff's house and tied him and sent him to gaol ; and that there being no charge whatever sent with him, he was discharged. On the other hand, it is admitted to have been well understood upon the trial, and stated by the plaintiff's counsel, that the defendant was a magistrate, and did assume to act as such in this matter, and that he really believed he had authority to do what he did. Under these circumstances, it does seem necessary, upon several adjudged cases, that the jury should be called on, as they were, to pronounce upon the bona fides of the defendant's conduct ; and though, I confess, my judgment would have led me to a different conclusion, in the absence of such authorities, yet I concur with my brothers, that upon the principles on which the court have acted in *Wedge v. Berkeley* (*a*) and other cases, we should give the defendant the benefit of the finding of the jury, that he acted as a justice of the peace, and bona fide believing that he had the authority, although we cannot say that we can see in the evidence anything that could have furnished a probable inducement to the belief, on the defendant's part, that he was justified in taking the steps he did.

JONES, J.—The protection afforded to magistrates, by requiring notice of action to be given to them, extends to cases in which they exceed their power, acting bona fide, as they suppose, within their jurisdiction (*b*).

The jury have found the bona fides of the plaintiff's conduct; whether he had reasonable grounds for acting is another question: the latter goes to the merits of the action, which is here found (and properly) for the plaintiff; the former is with respect to the correctness of the plaintiff's proceeding, to entitle him to recover upon the merits. There can be no doubt of his right to recover upon the merits, but can he do so without having given the defendant an opportunity to tender amends after notice, he having acted bona fide, as found by the jury. If the magistrate acted without reasonable cause, the plaintiff would be entitled to a verdict, after proof of notice, although it was shewn that the magistrate was acting bona fide. It appears to me the whole matter rests upon the bona fides of the defendant's conduct. If he acted without reasonable cause, and did not in truth believe that he was acting according to law as a justice, the plaintiff would be entitled to recover without notice. If, on the other hand, he acted without reasonable cause, but bona fide believing that he had authority to do what he did, then the plaintiff would be entitled to recover, having given the requisite notice. In *Wedge v. Berkeley* (*a*), Littledale, J., says, "It seems to me that the defendant acted bona fide; and that being so, he was entitled to notice;" and in that case there was no reasonable ground to justify the justice in his conduct. In *Reid v. Cowmeadow* (*b*), the learned judge, in summing up the case to the jury, stated that the question as to the point of notice was, whether the defendant had acted under a bona fide belief that he was proceeding in pursuance of the statute; for that, if he did so believe, he was entitled to notice. In *Cook v. Leonard et al.* (*c*), it was decided that the magistrate was not entitled to notice, unless he had some reasonable ground for believing that he had authority to do the act complained of, although he acted bona fide. The case of *Wedge v. Berkeley*, to which I have before referred, and which was decided ten years subsequent to the case of *Cook v. Leonard*, is at variance with the decision in that case. The case of *Cook v. Leonard* is questioned in a later case, *Cann v. Clipperton*, (*d*) and in a still later one, *Jones v. Gooday*, (*e*) without reference to *Cann v. Clipperton*. But if reasonable cause must be shewn, is there none here? The only witness examined, who was present at any part of the transaction, says, that he was attracted to the place by hearing that there had been a disturbance between the plaintiff and his wife, that he had heard that the plaintiff and his wife lived unhappily together, and that he had threatened to stab her with a pair of scissors, before he was tied; he also says, that the defendant is a magistrate, and commanded the witness in the Queen's name to assist to tie the plaintiff, and that he believes the defendant thought he was discharging his duty as a justice of the peace. It is quite clear that something had transpired before the witness was attracted to the place, which, in the opinion of the defendant, justified his tying the plaintiff and sending him to gaol, and requiring the assistance of the witness. Under these circumstances, I cannot but think that the defendant had some ground for his conduct, and for believing that he was acting within his authority, however much he has in truth exceeded it. I am inclined to think, that admitting there was no reasonable ground for

(*a*) 6 Ad. & El. 663.
(*d*) 10 Ad. & El. 581.

(*b*) 6 Ad. & El. 661.
(*e*) 9 M. & W. 736; 1 Dowl. N. S. 914.

(*c*) 6 B. & C. 351.

the defendant to believe that he was warranted in his proceeding as a justice, it being found that he acted *bonâ fide*, he was entitled to notice, but if there must be reasonable ground, the slightest being sufficient, I think there was some ground to justify him in his belief, and therefore that a nonsuit should be entered.

HAGERMAN, J., concurred.

Rule absolute.

JOHNSTON v. McDONALD.

Where in case for slander of the plaintiff in his office of treasurer of the Ottawa District, he stated as inducement that it was his duty to return to the government a correct account on oath of all sums received by him from collectors for assessments, and averred that the defendant alleged that he had perjured himself with respect to such statement, and the defendant pleaded negativing the inducement only, the plea was held bad, on special demurrer, as tendering an immaterial issue.

Case for slander of the plaintiff in his office. The plaintiff declares in his second count, that the plaintiff was at the time when and still is treasurer of the district of Ottawa, and had derived great profit from his office, and had acted honestly in it; and that whereas also it was the business of the plaintiff, in performing the duties of his office of treasurer aforesaid, amongst other things, to receive from the persons appointed to collect the same certain assessments imposed upon divers inhabitants of the said Ottawa District for the Provincial Lunatic Asylum, pursuant to the statute in that case provided, and to pay over the same to government, and also to return to government a correct statement, under oath, of the several sums received from the respective collectors of said assessments, and of the payments and legal deductions made thereout by the plaintiff, as such treasurer, once in every year; and the plaintiff saith, that in performing the said duties of his office as such treasurer, he always had, at the time of the committing of the said grievances by the defendant hereinafter mentioned, and hath hitherto faithfully, honestly, and righteously received from the persons appointed to collect the same, the assessments aforesaid, and paid over the same to government, and made a correct return under oath of the several sums received from the respective collectors of the said assessments as aforesaid, and of the payments and legal deductions made thereout by the plaintiff as aforesaid, once in every year, as it was his business as such treasurer to do. Nevertheless, the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and maliciously intending to injure the said plaintiff in his aforesaid good name, fame and character, and to bring him into public scandal, infamy and disgrace, with and amongst all his neighbours and other good and worthy subjects of this province to whom he was in anywise known, and to cause it to be suspected and believed by those neighbours and subjects that the plaintiff was guilty of the offences and improper conduct hereinafter mentioned to have been imputed to him by the defendant, afterwards, to wit, on the day and year aforesaid, in a certain other discourse which the defendant then had with Isaac Brock Cozens, in the presence and hearing of the said Isaac Brock Cozens and divers other persons, of and concerning the plaintiff, and of and concerning his said office of treasurer, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning

his said office of treasurer in the presence and hearing of the said Isaac Brock Cozens and the said other persons, these false, scandalous, malicious and defamatory words, that is to say : "He (the plaintiff meaning) was guilty of the crime of perjury in a certain return, which he (the plaintiff still meaning) had made to the Inspector General, for monies collected in the years 1839, 1840 and 1841, for the erection of a lunatic asylum ;" thereby meaning that the plaintiff, in performing the duty of his office as such treasurer, had made a false return, under oath, to the government, of the amount of assessments received by him as such treasurer. And afterwards, to wit, on the day and year aforesaid, in a certain other discourse which the defendant then had with one Abel Waters Wells, of and concerning the plaintiff, and of and concerning his said office of treasurer of the Ottawa District, the defendant, further contriving and maliciously intending to injure, oppress and ruin the plaintiff, then in the presence and hearing of the said Abel Waters Wells, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning his said office of treasurer, the false, scandalous and malicious words following, that is to say : "He (the plaintiff meaning) has perjured himself concerning some money that was collected for the lunatic asylum ;" thereby meaning that the plaintiff, in performing his duty as such treasurer, had made a false return, under oath, to government of the amount of assessments received by him as such treasurer ; "and that he (the plaintiff still meaning) would have been prosecuted if the house (meaning the provincial parliament) had not been prorogued unexpectedly"—meaning that the plaintiff would have been prosecuted by the government for making such false return under oath. By means, &c.—concluding in the usual form. And the defendant pleads, as to that part of the second count of the declaration which states that it was the business of the plaintiff, in performing the duties of his office of treasurer of the Ottawa District, to return to government a correct statement, under oath, of the several sums received from the respective collectors, of the said assessments in that count mentioned, and of the payments and legal deductions made thereout by the plaintiff as such treasurer aforesaid, once in every year ; that it was not the business of the plaintiff, as such treasurer as aforesaid, to make a return to the government, under oath, of the sums received from the collectors of the same assessments in that count mentioned, or of the payments, or legal deductions made thereout by the plaintiff, as such treasurer, in manner and form as the plaintiff hath therein alleged, and of this the defendant puts himself upon the country. Special demurrer.—Because the defendant's plea amounts to the general issue, and takes issue upon an immaterial part of the second count. Joinder in demurrer.

Eccles for demurrer.

Wilson, contra.

ROBINSON, C. J. The plea I think is bad, as taking issue upon an immaterial matter of inducement. It would be actionable to say of any public accountant, that he had given in false accounts on oath, whether any oath was necessary to be made or not. The innuendos in the declaration in both counts seem to extend the meaning beyond what is warrantable, but not so as to make the declaration bad on general demurrer ; for if both the innuendos were struck out, still there would be a good cause of action intelligibly stated. The meaning of the words is sufficiently

obvious without the aid of the innuendos, and their tending to injure the plaintiff in his office of treasurer, is undeniable. If, indeed, in order to sustain the plaintiff's action, as he has laid it, it were necessary to make out, that swearing falsely to the accounts referred to, would be perjury, the declaration would stand in a very different light, but that is clearly not so. The plaintiff sues as a public officer, for slander of him in his office. And if the whole charge made by the defendant were untrue, if there had been no accounts sworn to, and no oath required, the slander would no less entitle the plaintiff to an action.

Judgment for plaintiff.

O'CONNOR v. CLEMENTS ET AL.

The Municipal Council Act, 4 & 5 Vic. ch. 10, does not vest in the municipal councils of the several districts, the right of suing upon bonds given by collectors of assessments, to the treasurers of districts, after that act was passed; but, on such bonds, the treasurer of a district can sue in his own name.

Debt on bond, dated the 14th October, 1843, whereby the defendants became bound to the plaintiff in the sum of £300. The defendants craved oyer of the bond, and the condition thereof, which were in the following form : "Know all men by these presents, that we, Gustavus Clements, collector of the rates for the township of Gloucester, in the district of Dalhousie, and William Smith, of the township of Gloucester, and Peter Tomkins, of the township of Gloucester, are held and firmly bound to Daniel O'Connor, Esq., treasurer of the district of Dalhousie, in the sum of £300 currency, to be well and truly paid to the said Daniel O'Connor, Esq., treasurer, as aforesaid, or his successor in office ; for which payment to be well and truly made to the said Daniel O'Connor, Esq., we bind ourselves jointly and severally, our heirs, executors and administrators, firmly by these presents, sealed with our seals, and dated this 14th day of October, in the year of our Lord 1843. The condition of the above bond is such, that if the above bounden Gustavus Clements shall collect all rates and assessments for the township of Gloucester for the year 1843 (for which he has been appointed), and shall pay all monies which he may so collect, except his own per centage, to the treasurer of the district, on or before the third Monday in December in the said year 1843, then this obligation to be null and void, or otherwise to remain in full force and virtue." Special demurrer, because the said action is improperly brought in the name of the treasurer of the district of Dalhousie, instead of in the name of the District Council of the district of Dalhousie ; the said writing obligatory being a collector's bond. *And also*, because the statute which authorises the taking of such bond by the treasurer, provides the course to be pursued by him upon default, viz., that he should prepare and place before the quarter sessions, to be holden in the said district, after the first day of January in each year, a list of such collectors of rates as may be in arrear, and shall not have paid over the rates to the treasurer for the year in which they shall have been appointed ; and that it shall be the duty of the magistrates in quarter sessions assembled, to issue their warrant and distrain the goods and chattels of such collectors, and cause the same to be sold, (after having given twenty days' notice of the time and place of such sale), to the

amount of rates due the district, with costs thereon: and also, may proceed in like manner against the goods and chattels of the sureties named in the said collector's bond. Joinder in demurrer.

Eccles, for demurrer.

Boulton, Q. C., contra.

ROBINSON, C. J.—The defendant relies only on the first objection, viz., that according to the District Council Act 4 & 5 Vic. ch. 10, sec. 43, this action ought to have been brought in the name of the district council, and cannot be sustained in the name of the obligee. But we are of opinion that the effect of that clause is only to vest in the district council all debts, &c., due to the justices or treasurer, on the day named in it, viz., 1st January, 1842; and that it does not apply to disable a treasurer from suing upon a bond given to him after the statute 4 & 5 Vic. was passed. We have been constrained to hold, that the clause does apply to bonds like this, under which a debt had accrued to a treasurer before the 1st January, 1842, because the words are really so comprehensive and express, that they take in everything that can be called a liability (*a*). We have a strong impression, however, that the legislature may have meant the provision not to extend to such cases, but only to demands upon contracts and for work done, &c. for the district, which may have stood unascertained or unsettled, when the public affairs of the district were placed under other management than they had been. We do not, therefore, think that we are called upon, or should be warranted, in impeding the recovery of this plaintiff, upon an obligation expressly made to him, by extending the construction of the 43d clause so as to make it prospective, when, in terms, it is retrospective only.

Judgment for plaintiff on demurrer.

PICKLE v. PERRIN.

Where, by the terms of an award made between the plaintiff and defendant, in consequence of differences which had arisen about the defendant going on the plaintiff's land to embank a stream, on which the defendant had a mill, the defendant was directed to pay to the plaintiff £10 a-year as long as he should hold, occupy, use and enjoy for his own use and benefit the premises on which he had such occasion to go, or any part thereof—it was held that the payment was to be made every year, as long as the defendant's interest in the premises continued, although he might not have occasion to go on the plaintiff's land.

Debt on bond, conditioned to perform an award. The defendant set out the condition on oyer; and the question brought up by the pleadings turned upon the construction of the award, which directed an annual payment of £10 to be made by the defendant to the plaintiff, for permission to the defendant to go at all times, when necessary, upon the plaintiff's land, in order to make or repair an embankment, or do what might be required for confining within its proper channel a certain stream running through the plaintiff's land; and upon the part of which that ran through the defendant's land the defendant had a mill, situate upon his own premises. The parties, by the award, were ordered to convey each to the other these different premises in exchange; and the intention

(*a*) Eastern District Council *v.* Hutchins et al. ante page 321.

evidently was that the defendant, who was thenceforward to hold the land on which the mill was, was to have the privilege of going upon the plaintiff's land, which the defendant was required to convey to him, in order to control the stream within proper bounds, for the purposes of his mill. The direction of the award, as to the payment of the money, was that the defendant should, on 20th March in each year, pay to the plaintiff £10, "such yearly sum to be paid for such period of time, as the said defendant, his heirs or assigns, shall use, hold, occupy and enjoy to and for his own use and benefit the aforesaid premises, or any part thereof." Upon this award the defendant contended that he was only to pay while he made use of the privilege of going upon the plaintiff's land, and that, as he had not that year had occasion to do this, he had no payment to make; while the plaintiff urged that the meaning of the award was, that the defendant was to pay £10 every year, so long as he continued to be the proprietor of the premises, for the purposes of which this privilege was assured to him, and this whether he had occasion to use it or not. The learned judge being of this latter opinion, directed a verdict for the plaintiff; against which, as being contrary to law and evidence, and for misdirection,

Eccles obtained a rule nisi for defendant.

R. B. Sullivan shewed cause.

ROBINSON, C. J., delivered the judgment of the court.—We are of opinion that the construction placed upon the award by the plaintiff is the true construction, being the most reasonable interpretation, as well as the one most consistent with the words used. The rule obtained by the defendant must, therefore, be discharged.

Rule discharged.

McCORMICK v. BERZCY.

A statement by a party, upon being presented with an account, and payment demanded, "that he was satisfied the amount had been paid to the plaintiff's agent, that the agent had been in the habit of having large transactions with him, and was more frequently in his debt than otherwise, but that he could not say how the matter stood, as he had not his books to refer to," held not to be sufficient to take the case out of the Statute of Limitations.

This was an action of assumpsit upon an accepted order of William Richardson, upon the defendant and his brother, in favour of the plaintiff. The defendant pleaded the Statute of Limitations. It appeared that the order had been given more than twelve years ago; that it was found among the papers of a third party, now deceased, who in his lifetime had been the agent of the plaintiff; and, by an indorsement on the order, that a part of the sum had been paid. The plaintiff, to take the case out of the Statute of Limitations, gave evidence at the trial, that upon this order being presented to the defendant before action brought, he said "he was satisfied the amount had been paid to William McCormick, (the agent now deceased) that he had been in the habit of having large transactions with the defendant and his brother, and was more frequently in their debt than otherwise;" the defendant added, "that he could not say how the matter stood, as he had not his books to refer to." The defendant contended that this was not such evidence of the admission of the debt as

could take the case out of the statute. The learned judge directed a verdict for the plaintiff for the amount appearing to be due on the face of the order, reserving leave to the defendant to move for a nonsuit, in case this court should be of opinion that there was not evidence to take the case out of the statute.

Crooks, for the defendant, moved accordingly.

Vankoughnet shewed cause.

ROBINSON, C. J., delivered the judgment of the court.—We are clearly of opinion, that upon the evidence, the defendant ought to have had a verdict, unless the plaintiff had elected to be nonsuited; but as the learned judge was under the impression that there might be some doubt upon the sufficiency of the evidence, he directed a verdict for the plaintiff, reserving leave to the defendant, by consent of parties, to move for a nonsuit in banc. If we could see in the evidence that there was any ground afforded to the jury for finding in the plaintiff's favour, although we might think the sufficiency of the ground rather doubtful, we might consider it more proper to grant a new trial, in order that the jury might be called upon to pronounce an opinion upon any doubtful or equivocal conduct or expressions of the defendant, but the case was really so clear upon the evidence given, that there was nothing to be left to the jury. We think, therefore, that the rule for a nonsuit must be made absolute. Without saying that the state of this question upon English decisions would at any time have warranted us in holding the evidence here sufficient to prevail against the statute, it is too plain to admit of argument, that as the law is now settled, the evidence is altogether inadequate. An express promise to pay the debt certainly is not necessary, a mere acknowledgement of the debt as existing will be sufficient for the plaintiff's purpose, but it must be an acknowledgement from whence a promise to pay may be inferred. Here there was no acknowledgment of a debt, but an express denial of it, for the party asserted that he was satisfied it had been paid. How can it be said that the jury could imply from this that he promised to pay it again. He talked to be sure of his books, but not having them by him, he said he could not tell exactly how it was. The reasonable construction to give to that is, that he was satisfied from the course of dealing that this demand must have been long ago settled, though he could not remember in what precise manner, just setting up a case in which the Statute of Limitations was designed to afford protection. If the defendant had said "I have not my books and I know nothing about it," that would have amounted to nothing like an acknowledgement; but he is much further from admitting a case against himself, for he says expressly "he is satisfied the debt has been paid." If the defendant's expressions had been ambiguous, there might have been something to leave to the jury.

Rule absolute for nonsuit.

PRACTICE COURT.

CASES DECIDED BEFORE THE COMMENCEMENT OF THESE REPORTS.

HILARY TERM, 4 VICTORIA.

Before Mr. JUSTICE JONES.

JESSUP v. FRASER.

Where in a country cause, a short time before the Assizes, an interlocutory judgment was set aside by a judge's order, on payment of costs, and that the defendant should plead issuably and take twenty-four hours' notice of trial, and the defendant tendered the costs and pleas the evening before the first day of the Assizes, at the same time serving a written demand of replication, and offering to take one hour's notice of trial, notwithstanding which the plaintiff, having previously given notice of assessment, went on and assessed damages, the court held the assessment regular, the defendant not shewing that his pleas were issuable, and the delay in his proceeding, after the order was granted, being too great.

Interlocutory judgment had been signed in this cause, and on the 12th October, 1840, a judge's order was obtained to set it aside, permitting the defendant to plead on payment of costs, pleading issuably, and taking twenty-four hours notice of trial for the assizes for the Johnstown District, where the venue was laid, and the proceedings had been conducted: on the next day an appointment was taken out and the costs taxed: on the evening of the 17th (Saturday), the defendant's attorney received the allocatur at Prescott, the plaintiff's attorney residing at Brockville, where the assizes were to be held on the 20th, and on the afternoon of the 19th, between 4 and 5 o'clock, the defendant's attorney filed his pleas and tendered copies and the costs taxed to the plaintiff's attorney, at the same time offering to take one hour's notice of trial; he also served a demand of replication: the pleas and costs were refused, and the plaintiff assessed damages on the interlocutory judgment: and in this term,

A. Wilson obtained a rule nisi to set aside the assessment of damages for irregularity, on affidavits shewing the above circumstances, but filed no affidavit of merits.

J. H. Cameron shewed cause.

JONES, J.—There being so short an interval between the time when the interlocutory judgment was set aside and the opening of the assizes for the Johnstown District, the agent of the defendant's attorney should have used great diligence to have enabled his principal to have availed himself of the benefit of the order, but he did not take out his appointment for taxation, nor get his costs taxed till the following day, and not till Saturday morning did the defendant's attorney receive the allocatur, and then he took no further steps until five o'clock in the afternoon of Monday, the day preceding the assizes. It is not shewn that the pleas were issuable in conformity with the order, and even if they were, they were not filed in sufficient time to enable the plaintiff to give twenty-four hours' notice of trial, and it would not be reasonable to compel him to

receive pleas on the evening preceding the assize day, and reply to them, which it seems, from the demand of replication, was necessary, and also prepare for trial the next day; and the defendant has filed no affidavit of merits.

Rule discharged, with costs.

CORMACK ET AL. v. RADENHURST, ONE, &c.

When, in an action against an attorney, a bill was filed and a copy and demand of plea served in vacation, and several months after the plaintiffs signed interlocutory judgment, and gave notice of assessment, and assessed damages: Held, that although the demand in vacation was irregular, the plaintiff, by his laches, had waived the irregularity.

A rule nisi had been obtained, by *Crawford*, to set aside the interlocutory judgment, and assessment of damages in this cause, for irregularity. The bill was filed in April last, with a demand of plea, and notice to plead in Trinity Term following. No plea having been filed, the plaintiff signed interlocutory judgment on the 3rd August, and, on the 21st September, gave notice of assessment of damages for the Home assizes on the 13th October.

Grant shewed cause.

JONES, J.—The demand of plea in vacation was irregular, but the defendant, having allowed the plaintiff to sign interlocutory judgment, and give notice of assessment, has by his own delay waived the irregularity. He should have applied to a judge in chambers, to set aside the service of the demand of plea, or the interlocutory judgment. The application now is too late, and as there is no affidavit of merits, the court cannot interfere.

Rule discharged.

PROCTOR v. YOUNG.

Where a declaration was served before it was filed, and the defendant, being aware of the error, allowed interlocutory judgment to be signed, and notice of assessment given, held, that he was too late to object to the irregularity.

In this case the defendant obtained a rule calling upon the plaintiff to shew cause why the service of the declaration, and all subsequent proceedings, should not be set aside for irregularity. It appeared that the defendant had been arrested in this suit, and on the 15th August, 1840, the plaintiff served him with a declaration, although the defendant had not filed special bail, nor the plaintiff his declaration, until the 17th, on which day, before filing special bail, the defendant searched the office and found that no declaration had then been filed; the defendant not having pleaded, the plaintiff signed interlocutory judgment, and gave notice of assessment of damages, which were accordingly assessed at the Newcastle district assizes, notwithstanding a notice given by the defendant on the commission day that he would move to set aside the proceedings.

JONES, J.—The application is too late—the defendant was aware of the irregularity on the 17th August, and instead of at once giving notice to the plaintiff, and applying to a judge in chambers to set aside the service of the declaration, he lies by, and allows interlocutory judgment to be signed against him, and notice of assessment given; and not till the

first day of the assizes, when the plaintiff had taken further steps and incurred considerable expense, does he inform him of the irregularity, and that he will move to set aside the proceedings in consequence.

Rule discharged.

MOTT v. GRAY ET AL.

An attachment will not be granted against a sheriff, for not returning a writ, when he has been out of office for more than six months, before the rule to return the writ issued.

On a motion for an attachment against the late sheriff of the Eastern District for not paying over money, pursuant to a rule of this court, it appearing that the sheriff had been out of office more than six months when the rule was obtained, the attachment was refused. (a)

IN RE HAMILTON O'REILLY, ONE, &c.

The court will not grant an attachment against an attorney for not paying over money received by him as an agent, and not in his professional character, but if from the circumstances it appears that the attorney is not trustworthy, the court would probably interfere on a motion to strike him off the rolls.

Burns shewed cause against a rule obtained on the last day of last term, calling upon Hamilton O'Reilly to shew cause why he should not pay over to A. Notman, Esquire, 177*l.* 8*s.* 3*d.*, and interest from 6th December, 1837, with costs, and why, on default, an attachment should not issue against him. *Burns* took a preliminary objection, that a rule like this could not be granted on the last day of term, and cited 2 Dowl. 227, and 3 Dowl. 557.

JONES, J.—As to the preliminary objection, the cases cited, together with 1 Chit. 744, 1 Burr. 651, 4 Burr. 2502, shew that the court will not entertain the motion on the last day of term; but they do not establish the point raised in this case, that the rule, after it has been granted, cannot be acted upon—that objection is not tenable; the reason why the court refuse the rule on the last day of term, or within four days of the last day, appears to be because the attorney cannot shew cause in that term; and the consequences of granting the rule would be, that the matter would be hanging over him an unreasonable time. The affidavits in support of the application shew that the money was deposited in the hands of Mr. O'Reilly, as the attorney of the sheriff of the London District, and upon his retainer to be forwarded to Mr. Notman. In answer, Mr. O'Reilly swears that he was not retained as the attorney of the sheriff or any other person, to forward the money mentioned, but that the sheriff requested him as his friend to forward the money to Mr. Notman; and that he never received, nor expected to receive, from the said sheriff or any other person any fee or reward for forwarding the said money, and that he believes that the sheriff never expected to allow him anything therefor. Upon these affidavits, it must be taken, that Mr. O'Reilly was not employed as an attorney; and in such case the authorities shew that

(a) Archd. 162; Watson's Sheriff, 67; Dougl. 464; 4 East. 604.

the court cannot interfere by attaching the attorney (*a*). In 4 B. & Al. 47, Abbott, C. J., says—"The question in this case is, whether the court will compel an attorney to do that which in justice he ought to do. Now, the rule by which the court is to be governed in exercising this summary jurisdiction over its officers, seems to me to be this, when an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But when the employment is so connected with his professional character, as to afford a presumption that his character formed the ground of his employment by the client, then the court will exercise the jurisdiction ;" and the rule was made absolute. On a reference to the case stated, however, it appears clearly, that the attorney was professionally employed; and therefore it is no authority in support of this rule. The only case analogous to the present, is Knight's case ;(*b*) where the attorney was moved against to pay over money, the produce of bills which he had received to get discounted ; on the authority of 2 Chitty, 63. On a reference to that case, however, it is clear, that the attorney was professionally employed ; and it was never carried further than the rule nisi. All the late decisions are against this application, and this rule must be discharged ; but I shall discharge it without costs, on the authority of the case in 1 Dowl. 61 ; and although the court cannot proceed against the attorney summarily, by attachment, it is not clear that they may not, in a case of great impropriety like the present, tending to shew that the attorney is not trustworthy, interfere on application to strike him off the rolls.

Rule discharged without costs.

PRACTICE COURT.

TRINITY TERM, 5 VICTORIA.

Before Mr. JUSTICE MACAULAY.

SHORE ET UX. v. BRADLEY ET AL.

Where in an action of assumpsit against several, one of the defendants had obtained an order for particulars, which, after a lapse of several months, had not been delivered :—the court discharged a rule nisi which he obtained for the delivering of particulars by a certain day, or that he should be at liberty to sign judgment of non pros., on the plaintiff shewing that all the defendants had not appeared.

This was an action of assumpsit against three defendants, one of whom had obtained, some months ago, an order for the particulars of the

(*a*) 7 Moore 437; Tidd. 79 to 88; 1 Str. 621; 3 T. R. 275-6; East. 404; 8 East. 237; 6 Taunt. 105; 1 Salk. 87; 1 Dowl. 415, 468, 512; 2 Dowl. 161.

(*b*) 1 Bing. 91.

plaintiff's demand, which had not been complied with; and he, this term, the time for declaring having long elapsed, obtained a rule nisi for the delivering of particulars by a certain day, or in default thereof, that he should be at liberty to sign judgment of non pros.; in answer to which, the plaintiff shewed that one of the defendants had not yet appeared, and contended, that as judgment of non pros. cannot be signed until all the defendants are in court, that the rule should be discharged.

MACAULAY, J.—The rule must be discharged; if made absolute, its effects would be to put the plaintiff out of court as to all the defendants. If a year had elapsed since the return of process, a rescission of so much of the order for particulars, as operates as a stay of proceedings after a fixed day, as against this defendant, might perhaps enable him to avail himself of the objection, that the plaintiff was out of court for not declaring; but as the time has not yet expired, that point cannot now be raised.(a)

Rule discharged.

DOE CUBITT ET AL. v. MCLEOD.

An attachment for non-payment of costs, under the consent rule, in an ejectment on the demise of several lessors, was granted against one of them, without any proof of demand or service upon the others.

Motion by *R. E. Burns*, for an attachment against one of several lessors of the plaintiff, for non-payment of costs under the consent rule, on a verdict and judgment for the defendant on affidavit of the service of rule, &c., and demand on that one only, without any proof of service or demand on either of the others.

MACAULAY J.—Let the rule issue.

Rule for attachment ordered.

LANDRUM v. MACMARTIN.

It is no defect in a writ of venditioni exponas against lands, that it has not three months between its teste and return. (See 2nd Geo. IV., ch. 1, sec. 20.)

Motion to set aside a writ of venditioni exponas against lands tested on the last day of Michaelmas Term, 14th Nov. 1840, and returnable the 1st day of Easter Term, 1st February, 1841, on the ground that there were not three months between the teste and return, which it was contended there should be, to give operation to the statute 2nd Geo. IV., ch. 1, sec. 20.

MACAULAY, J.—No irregularity appears in this writ; or if any existed, the exception should have been taken last term. If a defect exist, it may be moved against now; but I do not consider the writ void on the exception taken, nor that there is such a defect as requires the court to annul it. It is merely an auxiliary process, directing the sheriff to complete the execution of the fieri facias, under which the lands (if in hands for want of buyers), must have been advertised according to law; and if the sale was not, as it ought to have been, duly adjourned, the three months' notice in the district, required by the directing part of the statute, might have been at once given on the receipt of the writ of venditioni exponas, although it would not expire until after the return day. There

(a) 1 Doug. 169; 9 B. & C. 544; 2 Doug. 507.

was ample time to have re-advertised six times in the Gazette, and though I think it better that three months should intervene between the teste and return of such writ; and though, if promptly moved against, it might be deemed a sufficient ground for setting it aside, though I do not say that it would, I certainly do not regard it as void, or so defective as to be incapable of execution. This rule must, therefore be discharged.

Rule discharged.

CLARKE v. DURHAM ET AL.

Where in an action of trespass against two, they pleaded the general issue, and separate justifications, to which the plaintiff demurred, and went to trial, and obtained a verdict on the general issue, assessing contingent damages on the demurrs on which judgment was afterwards given for one of the defendants and against the other: Held, that under 7 Will. IV. ch. 3, sections 24 and 26, the defendant who succeeded on demurrer, was entitled to enter judgment for his costs.

This was an action of trespass against two defendants, who pleaded the general issue and separate justifications; and the plaintiff, having demurred to the justifications, proceeded to trial and obtained a verdict, assessing contingent damages on the demurrs; but judgment having afterwards been given on the demurrs in favor of one defendant, though against the other, the successful defendant entered judgment thereon, and issued execution for his costs.

E. C. Campbell, for the plaintiff, moved to set aside the judgment and execution, for irregularity, on the ground that one defendant could not tax the costs of a demurrer against the plaintiff, under the circumstances of this case; and

J. Hillyard Cameron, for defendant, resisted the rule, claiming his costs under 7 Will. IV. ch. 3, sec. 26.

MACAULAY, J.—Until my attention was this day called to the 26th section of our statute 7 Will. IV. ch. 3, I thought that this defendant was not entitled to tax his costs on the judgment in his favour on demurrer. But although there is room for doubt, that clause (recognizing the right of a defendant who succeeds on demurrer, to costs) ought I think, (taken in connection with the former statutes on the subject of costs, and the residue of that act) to be construed as entitling to costs, one of several defendants, as well as a single defendant, who prevails against a plaintiff on demurrer.

Rule discharged.

CLARKE v. CLARKE.

An affidavit of debt that the defendant was indebted in a named sum on a promissory note *due at a day before the commencement of this suit*, the affidavit having been made several days before the writ issued, was held insufficient; as being equivocal and uncertain, on a reference to the court in banc.

J. Hillyard Cameron obtained a rule nisi to set aside the arrest in this cause, for defects in the affidavit of debt. The defendant was arrested on a writ issued on 20th March last, on an affidavit made on the 11th March, which stated that the defendant was indebted in a named sum, “*due to this deponent, as indorser of a promissory note made by the defendant, for*

the payment of 45*l.* 9*s.* 3*d.* with interest, to R. C. or order, *at a day before the commencement of this suit;*" Cameron objected that it did not appear that the note was due when the affidavit was made, the plaintiff relying upon the import and effect of the word "due."

E. C. Campbell shewed cause.

MACAULAY, J.—My own opinion is, that the affidavit is sufficiently certain, but having referred to my brother judges, they all think it defective; that the words "at a day before the commencement of this suit," are not equivalent to the words "at a day now past;" and that if the word "due" would otherwise have been sufficient, still, followed as it is by the words "at a day before the commencement of this suit," it becomes equivocal and divested of its positive character; rendering it very questionable whether, on an indictment for perjury, if the notes were really not due, the latter expressions might not avail the plaintiff, as qualifying the assertion. In deference, therefore to the other judges, this rule must be made absolute.

Rule absolute.

MACKENZIE v. REID.

An affidavit of debt for £80, on a promissory note for that amount, and also for goods sold, not specifying the sum due on each account, nor whether the goods sold formed the consideration of the note: held insufficient.

The defendant had been arrested on an affidavit of debt made by the plaintiff, in which he stated that the defendant was indebted to him "in the sum of £80 upon a promissory note for £80, made by the defendant, and payable to the plaintiff at a day long past, and now due and unpaid; and also for goods sold and delivered by the plaintiff to the defendant, and at his request," &c.

J. Hillyard Cameron, for the defendant, moved to set aside the arrest on the ground that the affidavit was not sufficiently certain, and did not shew what amount was due on the note, nor what amount was due for the goods, nor whether the sale of the goods formed the consideration of the note.

Burns shewed cause.

MACAULAY, J.—The rule must be made absolute: the affidavit is defective on the grounds which have been urged by the defendant.

Rule absolute.

JOHNSON v. SPARROW.

When a new trial is ordered on payment of costs, the party to whom the indulgence is granted, must attend promptly to their taxation and payment; and if he suffer so long a time to elapse, that the plaintiff cannot proceed to trial at the following assizes, without embarrassment, the court will not, after the plaintiff has obtained a rule to enter judgment, discharge that rule, and allow the defendant the benefit of his rule for a new trial.

Crawford, for the defendant, obtained a rule nisi, to rescind a rule made this term, discharging the defendant's rule of last term for a new trial on payment of costs, the rule for a new trial having been discharged because those costs had not been paid. It appeared on affidavit that the

first appointment to tax costs had been taken out on 5th May ; that it was several times enlarged ; that on the last enlargement no one attended for the defendant ; that the plaintiff's attorney was written to by his agents on the 5th May, for a bill of costs ; that he received the letter on the 10th May, and that the next day was the last for giving notice of trial for the assizes in the district wherein the action was brought, and that the costs had not been paid. The rule for a new trial was not served until the first appointment.

MACAULAY, J.—It clearly appears that the defendant has been guilty of laches, in not duly serving his rule, and obtaining an appointment to tax costs, at a period sufficiently early to enable the plaintiff's attorney to furnish a bill, and to proceed to trial after the costs were paid. Nothing was done until the 5th May, not even the rule served, nor any step taken, indicative of a design to accept a new trial, or to comply with the terms imposed.

Rule discharged.

PRACTICE COURT.

MICHAELMAS TERM, 5 VICTORIA.

Before Mr. JUSTICE JONES.

SMITH v. COTTON.

After the venue has been changed at the instance of the defendant, the court will not, unless under very special circumstances, allow the plaintiff to amend his declaration, so as to bring it back to the district where it was originally laid.

J. Hillyard Cameron applied for a rule nisi to amend the declaration, by changing the venue from the Home to the Niagara District. The venue was originally laid in the Niagara District, and after issue joined, it was changed to the Home District, on a special affidavit by order of a judge in chambers; the plaintiff then gave notice of trial for the Home Assizes, but not proceeding to trial, the defendant obtained costs of the day for the default. This motion was made on the affidavit of the plaintiff's attorney, "that if the venue is brought back to the Niagara District, he will be able to proceed to trial at the next assize there, and to give much material evidence there which he fears he will not be able to do in the Home District."

JONES, J.—This application is to the discretion of the court, and if I could see that justice would be furthered, I would grant the rule. It rests upon similar grounds to an application by the defendant to change the venue upon special affidavit. But the venue was changed by the defendant without opposition, or upon hearing both parties ; and the plaintiff now moves to bring it back, upon the affidavit of his attorney,

that he fears that he will not be able to give such material evidence in the Home as in the Niagara District; without assigning any reason for his apprehensions.

Rule refused.

BENSON v. LOVE.

After an award had been made, the arbitrators, discovering that they had made a mistake in the amount awarded, destroyed their award, and executed another: the court set the second award aside.

Motion to set aside an award, under the following circumstances: The arbitrators made their award in favour of Benson, and took his promissory note for his proportion of the expenses; but finding that they had made a mistake, in allowing him credit twice for the same sum, upon the same day, and before the time for making their award had expired, they cancelled the first award, and made a second in Love's favour. This second award Benson moved to set aside, on the ground that the authority of the arbitrators ceased on the execution of the first award.

JONES, J.—I am of opinion that this rule must be made absolute. The award was executed, and ready to be delivered to the parties according to the submission, and was only retained by the arbitrators until they had obtained Love's note for his proportion of the expenses. Being executed and ready to be delivered to the parties, it was complete; there was an end of their authority; and they could neither alter their award, nor destroy it and make a new one. Lord Ellenborough remarks, in 8 East. 54, "the arbitrator's authority having been once completely exercised, pursuant to the terms of the reference, was at an end, and could not be revived, even for the purpose of correcting the mistaken calculation of figures;" observing, "that such mistakes might include the essential merits of the case." Here, the award was made in favour of Benson, of which he had notice; but the arbitrators being satisfied that they had given him twice credit for the same sum, reversed their decision, and made what they now declare to be a first award in favour of Love.

Rule absolute.

PROUDFOOT v. TROTTER ET AL.

Where, owing to the misconduct of a party to a reference, arbitrators do not make their award, but an award is made by an umpire, costs will not be granted to the other party on a summary application, under the clause in the rule of reference, "that if either party shall by affected delay or otherwise wilfully prevent the arbitrators or umpire from making their award, he shall pay such costs to the other as the court shall think reasonable and just."

After this cause was entered for trial, at the Home Assize, it was referred to arbitration by order of nisi prius, which contained the usual clause, "that if either party by affected delay or otherwise, shall prevent wilfully the arbitrators or umpire from making an award, he shall pay such costs to the other, as the court shall think reasonable and just." No award was made by the arbitrators, in consequence, as was alleged in some of the affidavits, of the misconduct of the defendants, but an award was afterwards made by the umpire, which was subsequently set aside, on the application of the defendants; and *W. H. Boulton*, for the plaintiffs,

this term obtained a rule nisi, for the payment of the costs of putting off the trial, the arbitration, and of an attachment upon the award, on the ground that the award had been ineffectual by the wilful misconduct of the defendants.

JONES, J.—The provision respecting costs in the rule of reference, is intended to authorize the court to award costs where no decision is made by either the arbitrators or the umpire, but not where the arbitrators failing, the umpire makes his award; and even if this motion could be entertained at all, it could only be for the costs before the arbitrators, and such costs were not unnecessarily incurred, as the umpire founded his award upon the evidence given before them.

Rule discharged.

DOE LICK v. AUSMAN.

After four terms have elapsed since the last proceeding, an amendment cannot be made in a declaration, without a term's notice.

This action was commenced in 1826, and the plaintiff in that year obtained a verdict, which was afterwards set aside, and since that time no proceeding has been taken; and

A. Wilson, on his behalf, now moves to amend the demise in the declaration, by increasing the time from seven to twenty-five years.

G. Ridout, for the defendant, opposes the motion, on account of the lapse of time; and also objects, that no term's notice of this motion was given, which he contends was necessary.

JONES, J.—It is quite clear that the amendment prayed for might be allowed, but I think the defendant entitled to a term's notice, according to the rule, "that in all cases in which there have been no proceedings for four terms, &c., the party who desires to proceed again, shall give a term's notice to the other of such proceedings."

Rule discharged.

BOULTON v. JARVIS.

After a cause has been carried down to trial, and made a remanet, the defendant cannot rule the plaintiff to enter the issue, but the proper course is to take the cause down to trial by proviso.

Boulton, Q. C., for the plaintiff, obtained a rule nisi to set aside the judgment of non pros. signed in this cause for not entering the issue, for irregularity. The cause was carried down to trial, and made a remanet by consent, at the Home District Autumn Assizes, in 1839: no further step was taken from that time until the 6th February, 1841, when the defendant ruled the plaintiff to enter the issue, which not having been done, he signed judgment of non pros. On the 17th March following the plaintiff objects to the regularity of this judgment, 1st, because the cause having been made a remanet, no rule to enter the issue could be taken out; and 2ndly, if the rule could be issued it was necessary that a term's notice should first have been given.

Gwynne shewed cause.

JONES, J.—The practice of this court is to pass the record upon an incipit of the roll, without any issue book, which is dispensed with by the 6th rule of Easter Term, 11 Geo. IV., and where issue is joined, and notice of trial given, and the record of nisi prius passed, and the plaintiff

fails to proceed to trial, judgment as in case of a non-suit is invariably granted, without any other entry of the issue ; and it appears to me, that if a cause is made a remanet under such circumstances, the defendant may carry it down to trial by proviso, without any further entry of the issue ; for if he can have judgment as in case of a non-suit where the plaintiff fails to proceed to trial, after his record is entered for trial, without any entry of the issue, upon the same principle he must be entitled to try by proviso, where a cause is made a remanet, without any more formal entry of the issue. Upon the second point, I think a term's notice was necessary. In 2 B. & Al. 594, and in *Culver v. Moore*, Taylor, 623, in this court, a term's notice in similar cases was held unnecessary in analogy to their not being requisite in motions for judgment as in case of a non-suit ; but in 9 B. & C. 621, the case in 2 B. & Al. is over-ruled, and Lord Tenterden says—"the rule to enter the issue is an interlocutory stage in the cause, as it is convenient that that person who has suffered so long a time to elapse without taking any step, should give a term's notice to proceed. I think it reasonable to consider the rule for entering the issue as one to which the rule of court requiring a term's notice extends." I therefore think that the rule should be made absolute on both points ; but, as the questions are new and important, without costs.

Rule absolute.

DOE MCKAY *v.* ROE.

In an action of ejectment by an heir, the court refused to stay proceedings, until the costs of a former action, brought for the same premises by the ancestor, had been paid; the ancestor having died before any legal determination of that suit.

Motion to stay proceedings until the costs of a former action of ejectment, brought for the same premises by the present lessor's father, who died pending the former suit, should be paid ; the present lessor claiming as the heir at law of his father. The rule was opposed, on the ground that no right to costs had been established in the former action by the defendant, as it had been abated by death ; and that there was no precedent for staying proceedings under such circumstances.

JONES, J.—The first action has abated for no default of the lessor of the plaintiff, nor of his ancestor ; the liability of the party to pay costs has not therefore been ascertained ; and without any authority on the point, I cannot make the rule absolute.

Rule discharged.

CROOKS *v.* O'GRADY.

Where, after the delivery to a sheriff of a writ of execution against lands, the plaintiff and defendant agreed to compromise, and after a delay of more than two years the compromise was not effected, and the plaintiff obtained a rule for an attachment against the sheriff for not returning the writ : the court set the rule aside.

A rule nisi had been obtained by *Gwynne*, to discharge the plaintiff's rule for an attachment against the sheriff of the Home District, for not returning the writ of fieri facias against the lands of the defendant, under the following

circumstances. The writ of fieri facias was placed in the sheriff's hands on the 21st December, 1838. On the 21st January, 1839, the defendant conveyed certain lands to trustees for the payment of the debt in this action, and other debts; and *R. P. Crooks*, who claimed the interest in this judgment, agreed to take a deed of those lands from the trustees and the defendant, in satisfaction of this execution, and of another claim, and to pay the sheriff's fees. The sheriff was no party to this arrangement, but forbore to proceed, in consequence of it. The arrangement, however, fell through, some flaw having been discovered in the title; and although the trustees were still willing to convey, the plaintiff now proceeded to attach the sheriff, after a delay of two years and a half.

R. P. Crooks shewed cause.

JONES, J.—The rule for an attachment against the sheriff must be discharged; the plaintiff's remedy must be by action, for not levying, and not proceeding to the sale of the lands, if the sheriff was not justified in forbearing to proceed, by the conduct of the plaintiff himself.

Rule for attachment discharged.

PRACTICE COURT.

HILARY TERM, 5 VICTORIA.

Before MR. JUSTICE MCLEAN.

TENBROECK v. COLE.

Where no notice of trial had been given, the parties agreeing to try the cause by consent, the plaintiff entered the record for trial, and afterwards withdrew it. Held, that he was liable for the payment of the costs of the day, for not proceeding to trial.

Motion for costs of the day, for not proceeding to trial at the assizes for the district of Niagara. It appeared that no notice of trial had been given, the parties agreeing to try the cause by consent; that the plaintiff had entered the record for trial, and afterwards had withdrawn it; and now resisted payment of these costs, on the ground that there was no notice of trial, and that great forbearance had been shewn by the plaintiff to the defendant.

MCLEAN, J.—The rule of court, Hilary, 7th Geo. IV., declares that no cause shall be tried at the assizes for any district, unless the record of nisi prius is delivered, on the commission day of the assizes, to the marshal. Notwithstanding the terms of this rule, records are frequently entered by consent after the first day of the assizes; and it would scarcely be regarded as a sufficient ground for setting aside a verdict rendered in such a case, that the cause had been entered and tried contrary to the rule of court. The plaintiff's were entitled, after the entry of the record, to proceed to trial, though it might be objected to by the defendant; and, having obtained the advantage of this position, cannot object to its liabilities, nor escape the payment of those costs which the defendant has incurred in consequence of his not proceeding.

Rule absolute.

FULLMER ET UX. v. DOUGAN.

The writ of summons in dower must be served fourteen days before the return day.

This was an application to set aside a writ of dower, and a writ of grand cape, on the ground that the service of the writ of dower had been made the day before the return day, that there was no return by the sheriff on it, and that there were not fourteen days between the teste and return of the writ of grand cape.

MCLEAN, J.—The rule of court of Easter Term, 1 Will. IV., which prescribes the original or first writ in dower, requires that the "time of return shall be conformable to the English practice in such cases." The action of dower has now become nearly obsolete in England, and the books are not very distinct as to the practice. It appears, however, that when the original writ is obtained, the process upon it is a summons, which is to be served upon the tenant or upon the land; after which, pursuant to 31 Eliz. ch. 4., proclamation must be made of that summons, fourteen days before the return, at the church door of the parish in which the lands lie, and that proclamation must be returned, together with the names of the summoners; for without it no grand cape can be awarded, but an alias and pluries summons. It is obvious from this, that there must be at least fourteen days between the service and return of the original process in England. The return, in this case, was not conformable to that practice, as the process was returned the next day after the service. There is not however any return by the sheriff on the original process, which appears to me essential, before the issuing of the writ of grand cape. In this country, it may not be practicable to comply with the statute of Elizabeth in making proclamations, and when the service is personal on the tenant, there does not appear any necessity for it, even if it were practicable; but there can be no good reason why the original process should not be served fourteen days before the return, as required in England, and in conformity to the spirit of the rule of court in this province.

Rule absolute.

PRACTICE COURT.

TRINITY TERM, 6 VICTORIA.

Before Mr. JUSTICE MACAULAY.

STULL v. MCLEOD.

It is no sufficient ground for opposing a rule for an attachment for not returning a writ of execution against goods, that there is a question depending before the court respecting the title to those goods. The sheriff should, in such a case, apply to have the time extended for making his return, until the question of property is decided.

A motion for a rule for an attachment against the sheriff of Niagara, for not returning a writ of fi. fa. in this cause, was opposed by *J. H. Cameron*.

for the sheriff, on the ground that a question of title respecting certain property sold was pending before the court, and undecided.

MACAULAY, J.—If any peculiar grounds for delay exist, the sheriff should have moved to extend the time for returning the writ; that which might be a good cause for granting more time, does not therefore constitute a sufficient cause against an attachment for not returning the writ, which would in that event be indefinitely delayed. The writ must issue.

HIBBERT v. JOHNSTON.

A rule nisi having been obtained to set aside a bailable writ and arrest thereon, for irregularity, the rule was discharged with costs, for a variance between the christian name of the plaintiff in the cause, and the name in the rule.

A rule nisi obtained by *Eccles* to set aside a bailable writ and arrest thereon, was opposed by *Saxon*, on the ground of a variance between the christian name of the plaintiff in the cause, and the name in the rule.

MACAULAY, J.—I consider the misnomer apparent on inspection, and that it constitutes a variance not obviated as being “*idem sonans*.” Indeed the plaintiff’s true name is that of a *woman*, whereas the name in the rule is that of a *man*. I feel bound to treat it as fatal. The defendant objecting to the plaintiff’s regularity, must on her part be strictly regular. The defect cannot be amended.

Rule discharged, with costs, being moved with costs.

THOMPSON v. CALDER.

It is irregular to serve process on a witness while attending in court at nisi prius, under subpoena.

This was a motion to set aside the service of process, on the ground that the defendant was served while attending as a witness in court at nisi prius, under a subpoena.(a)

MACAULAY, J.—The case cited of *Cole v. Hawkins*,(b) is expressly in point, and the best writers, to the latest period, refer to it as in force. The references support the objection, and I do not see that I can do otherwise than make the rule absolute as moved.

Rule absolute.

HAMILTON v. HOWCUTT.

Where a motion is made to set aside proceedings, for irregularity, and the irregularity is mentioned specifically neither in the rule, nor in the affidavit on which it is moved, nor pointed out in the rule by reference to the grounds disclosed in the affidavit, the rule will be discharged.

This was a motion to set aside the service of the writ of ca. re. and proceedings in this cause, for irregularity, with costs, but the irregularity was not specifically mentioned, either in the rule, or in the affidavit on

(a) *Tidd.* 168; 2 *Sellon*, 1; 1 *Sellon*, 99; 8 *Ch. Pt.* 265; *Stat.* 10 & 11 *Will. III.* c. 3, sec. 2; *Stat.* 10 *Geo. III.* ch. 50.

(b) 2 *Stra.* 1094; *Andr.* 275.

which it was moved, nor was it pointed out in the rule, by reference to the grounds disclosed in the affidavit.

MACAULAY, J.—Strictly speaking, the motion should perhaps have been to set aside the copy of process, on the ground of *variance*, rather than the *service* of the writ.(a) According to *Hacker v. Jarmaine*,(b) it was not objected that the writ had been served in the wrong district, and if it had been, the affidavit might be found defective in one point.(c) The cause shewn establishes conclusively that the writ was served in the right district; so that no objection exists, except on the score of *variance*, in the copy, which probably would constitute an insufficient service, as not being a service of the writ itself; but it is submitted by the plaintiff's counsel, that this rule does not sufficiently designate the objection intended to be urged. It refers to an affidavit filed, not saying by whom; on reading the affidavit alone, no irregularity appears. The copy of process prefixed is not referred to, and some of the cases shew that it ought not now to be noticed. In *Stephens v. Pell*,(d) a reason is assigned, and in other cases.(e) But if referred to as being verified by the affidavit, neither the rule nisi, nor the affidavit, specifies any objection to the *service*; and on inspection, none would appear, unless upon one of two conjectures, viz., that a writ to the Niagara sheriff had been served in the Home District; or that a writ, directed to the Home sheriff, had been served as if directed to the Niagara sheriff;—the one constituting a case of service in the wrong district, and the other of a variance in the copy from the original; the production of the original shews that it was in fact the latter. But in considering the preliminary exceptions to the sufficiency of the rule nisi, it is material to notice the obvious uncertainty as to the ground of the defendant's motion, even admitting that the objection is to be noticed as visible on the face of the copy exhibited; but beyond this, I think the rule nisi is sufficient. The cases and books of practice are certainly not clear or uniform on the subject; from some it may be inferred, that it is enough to produce and file affidavits and documents on the face of which, or by the perusal whereof, the objection can be seen, though not distinctly specified; the objection or objections intended to be relied upon, being mentioned to the court at the time of moving.(f) The better opinion seems however to be, that it is more proper to state in the affidavit or rule nisi all the objections which it is proposed to rely upon.(g) And in the present case, as the ground of irregularity which the plaintiff was called upon to answer, is not stated in the rule nisi, or the affidavit therein referred to, and is not necessarily included in the words "service of this tes. ca. re." used in the rule, but left to be discovered or detected by perusing the copy prefixed to the affidavit, I think it most advisable, and in conformity with the present practice on the subject of rules to set aside proceedings for irregularity, to hold it insufficient; and that I should discharge the rule, though, being doubtful, and a new point, without costs.

Rule discharged.

(a) 4 Mod. 412; Ch. Rep. 15.

(b) 3 Dowl. 381; 1 Dowl. 654; 3 Ch. P. 277, 237, 238.

(c) 3 Ch. P. 278.

(d) 2 Dowl. 629.

(e) 3 Ch. Rep. 548, 579; 3 Dow. 455, 6. (f) 3 Ch. P. 581.

(g) 3 Ch. P. 80, 2.

HADLEY v. HEARNS ET AL.

An affidavit sworn before the partner of the attorney of the party on whose behalf the affidavit is made, cannot be read.

This was a rule to shew cause why the service of the declaration in this cause should not be set aside against two of the defendants, on grounds disclosed in the affidavits filed; or why the alias writ should not be set aside; or why the service of the alias ca. re. upon two of the defendants, should not be set aside for irregularity, with costs, on grounds disclosed in affidavits filed, and proceedings stayed. It appeared that the affidavits relative to the service of the declaration against two of the defendants, had been sworn before E. F., a person acting as clerk or assistant in the office of A. B., (the defendant's attorney), and C. D., his partner; and that the affidavits relative to the service of the alias writs of ca. re. were sworn before C. D., the partner of the attorney of the party on whose behalf the affidavits were made.

MACAULAY, J.—It appears that the rule of practice excluding affidavits made before the attorney of the party, is not restricted to cases where there is an attorney of record; consequently, A. B. was in this case incompetent to have administered the affidavits on which this rule is founded. Then the case in 1 Price 116, determines that the partner of the party's attorney is equally incompetent. It follows that the affidavits made before C. D. cannot be read, consequently that part of the rule, which relates to the writs of alias ca. re., must be discharged; the effect whereof is, that the court have no longer any judicial knowledge, as respects this motion and rule, that any alias ca. re. has been issued at all, or served, and the case is reduced to the objection to the declaration; as to which I do not find, that the affidavits sworn before E. F., are liable to the same exception as those sworn before C. D. The rule nisi refers to affidavits filed, as containing the grounds of irregularity; meaning those sworn before E. F. It does not therein appear that no process was issued against the two defendants who move, or that no appearance has been entered for them; either by the plaintiff, as under the statute, or by an attorney, as on their behalf, (and there are three defendants in the case), or that no declaration was filed. The objection is not to the *declaration* itself, but to the *service* thereof, which *service* seems regular enough; and the objection is made at a late period, copies having been received on the 22nd February, and 2nd March, by the defendants respectively, and an assize has since intervened; I cannot intend that no declaration was filed in these proceedings. It appears to me the rule should be discharged, though without costs, failing as it does by reason of the rejection of the affidavits made before C. D.; which, if noticed, would shew that the plaintiff had, by issuing an alias ca. re., impliedly waived the declaration; and having issued the alias before giving notice of such waiver, the motion to set aside the latter would in all probability have prevailed, and then the declaration being impliedly waived, by a step thus irregularly taken, the whole would have fallen to the ground together.

Rule discharged, without costs.

PRACTICE COURT.

MICHAELMAS TERM, 6 VICTORIA.

Before Mr. JUSTICE JONES.

DOE KEMP v. ROE.

Where in a country cause the tenant was called upon, in the notice from the casual ejector, to appear within the first four days of term, and he obtained a rule nisi to set aside the service of the declaration for irregularity, on that ground, the lessor of the plaintiff had leave to amend the notice, on payment of costs.

Campbell moved to set aside the service of the declaration, for irregularity in the notice to the tenant to appear, the cause being a country one, and the notice to appear on the *first* day of the term, instead of the term generally.

J. H. Cameron, for the plaintiff, contended that the notice was sufficient; but if not, that it could be amended.

JONES, J.—By making this application, the tenant has shewn that he is not ignorant of the proceeding, and I see no objection to the plaintiff moving for judgment against the casual ejector on this notice; although, had he proceeded to act upon it, and enter his judgment before the time allowed for appearing in country causes had elapsed, his proceedings would have been irregular. I think, also, that the notice might be amended.(a)

Rule discharged, without costs.

THE COMMERCIAL BANK v. McDONELL ET AL.

It is an irregularity only, and not a nullity, to issue an alias fi. fa. after a return of "goods on hand" to the original fi. fa., and a ven. ex. upon it, on which the sheriff returns "that the goods had been exhausted by prior writs;" and the irregularity is waived by the application against it not being made in due time.

J. H. Cameron, for the defendant, obtained a rule nisi, to set aside the alias writ of fieri facias in this cause, for irregularity. On the original writ of fieri facias, the sheriff had returned "goods on hand;" but on a venditioni exponas being issued, he returned on it that he could make nothing, as the goods previously seized "had been exhausted on prior writs." Upon this return, the plaintiffs issued the alias writ, returnable in last Trinity Term, without the leave of the court, or a judge; and the defendants now contend, that the writ was a nullity.

Draper, Q. C., shewed cause.

JONES, J.—I am of opinion that this is only an irregularity, and this application has not therefore been made in due time. The sheriff is not

(a) Arch. 75, 76, 77, 78; Barnes, 175; 1 Dowl. 18; 7 T. R. 469.

precluded, by his return of goods on hand to a certain value, from shewing that the goods brought less than that value, on the subsequent writ ; and so I consider that he is not bound for any sum on the venditioni exponas, where he cannot by possibility make any thing, as, if an act of bankruptcy had occurred after the seizure and before the sale.

Rule discharged.

GRISDALE v. BOULTON.

Where on a reference to arbitration, after the arbitrators had commenced their investigation, both the plaintiff and his attorney requested delay, and understood that it had been granted, but the arbitrators made their award in favour of the defendant, without giving further time, and without hearing all the testimony that the plaintiff might have offered: the award was set aside, without costs.

Armour obtained a rule nisi to set aside an award made in this cause. It appeared by affidavits, that this cause had been referred to arbitration, by rule of reference at nisi prius after the jury had been sworn, and the evidence heard ; that on the same day the arbitrators proceeded with the reference, the plaintiff's attorney appeared before them and requested time to communicate with his client, and for the production of certain promissory notes and books of account by the defendant, of which he had given him notice, and then left the arbitrators, understanding that they would not then proceed with the award ; and that one of the arbitrators had informed the plaintiff that they would not decide the matter before a month, and that he would receive notice to bring his witnesses before them. The arbitrators did not however give time to the plaintiff, but proceeded to make their award, on the evidence taken at nisi prius alone, and determined the matter in favour of the defendant.

W. H. Boulton shewed cause.

JONES, J.—I think that the arbitrators acted hastily, and without giving the plaintiff sufficient opportunity to produce further testimony if he desired to do so ; and although the court will not enter into the merits of the case, where the proceedings on the part of the arbitrators have been regular, and no corruption or mistake is attributable to them, yet the court must take care that every opportunity is afforded to the parties to be heard, and to produce their testimony ; and as the plaintiff here has not had that opportunity, I am of opinion, on the authority of the cases cited, (a) that the award must be set aside, but without costs.

Rule absolute, without costs..

CAMPBELL v. BOULTON.

Where an award is set aside for irregular proceedings on the part of the arbitrators, such as the examination of witnesses in the absence of the parties, it will be set aside without costs.

J. H. Cameron, for the defendant, obtained a rule nisi to set aside an award in favour of the plaintiff, on the ground that the arbitrator had proceeded with the examination of witnesses who were not brought before him by either of the parties, and in the absence of the parties, and without

(a) 2 Chit. 44; 1 Bing. 284.

notice to or the assent of the defendant ; and these facts were fully made out by the affidavits filed.

Crawford shewed cause.

JONES, J.—Where the proceedings have been regular, and the parties duly heard, the court will do all in their power to uphold the award; but they will always see that the proceedings are regular, and that an opportunity has been given to the parties to produce their witnesses respectively, and cross examine those of their opponent. Here the arbitrator, in his desire to get all the information in his power, has not only examined witnesses not required by either party, but has examined them in the absence of the parties. This is such an irregularity as requires the interference of the court, and the rule for setting aside the award must be made absolute, but without costs ; as the plaintiff cannot be required to pay the costs, where the irregularity complained of has been in the proceedings of the arbitrator.

Rule absolute, without costs.

FORTUNE v. HICKSON ET AL.

One of several defendants in a cause, against all of whom a verdict had been recovered, was allowed, on summary application after judgment, to set off the amount of a judgment which he had recovered against the plaintiff, against the plaintiff's judgment against him and his co-defendants, saving to the attorney his lien for costs.

Motion to set off a judgment obtained by Hickson, one of the defendants, against the plaintiff, against the judgment obtained by the plaintiff. It was contended that the set-off was not admissible, as the judgments were not between the same parties, and at all events that it ought not to prejudice the attorney's lien.

JONES, J.—The set-off is clearly admissible, but it must be subject to the attorney's lien for his costs.

Rule absolute.

GIBBS v. KIMBLE.

If a plaintiff omit to indorse his claim for debt and costs on a bailable writ, the arrest under the writ will be set aside, although the omission is supplied immediately after the arrest is made.

Rule nisi to set aside an arrest for want of the indorsement of the plaintiff's claim for debt and costs on the writ, pursuant to the rule 3 Trinity Term, 3d and 4th Will. IV. It was shewn for the plaintiff, that the amount was indorsed immediately after the arrest, which it was contended was a sufficient compliance with the rule.

JONES, J.—The rule is plain and positive, and the indorsement must be made before the arrest ; and in a case in Easter Term, 6 Will. IV. in this court, it was held that the omission of this indorsement on the bailiff's warrant invalidated the arrest, although the indorsement was made on the writ on which the warrant issued ; and the court said " It is necessary that the sheriff, possessing the information, should also place his officer in possession of it, in order that the

debtor when arrested may know the extent of the claim made upon him." Here the required information is not given, either to the sheriff or the debtor, in time. Rule absolute, (no action to be brought).

STRATHY v. CROOKS.

Where the defendant obtained time to plead by judge's order, "on the usual terms," and the plaintiff, after pleas pleaded, took issue upon some and demurred to others, and the defendant obtained an order to amend his pleas or join in demurrer, with further time to rejoin "upon the usual terms," and served both his orders, but afterwards and within the time in which he would have been entitled to rejoin without any order for further time, filed a special demurrer to the plaintiff's replication, upon which the plaintiff signed interlocutory judgment: Held, that the interlocutory judgment was regular; the defendant being bound, by his order for further time to rejoin, after having served it, and the special demurrer being in contravention of the undertaking to rejoin upon the usual terms.

Crooks, for the defendant, moved to set aside the interlocutory judgment, for irregularity. The defendant had obtained time to plead, "on the usual terms," and pleaded several pleas, to some of which the plaintiff replied, and to others demurred; the defendant then obtained an order to amend the pleas demurred to, and for time to rejoin "on the usual terms," and served his last order on the plaintiff, but without afterwards availing himself of the extension of time, demurred specially to the plaintiff's replication within the usual time; upon which the plaintiff signed interlocutory judgment.

J. H. Cameron shewed cause.

JONES, J.—The "usual terms" mean rejoining issuably, and taking short notice of trial; and the defendant having served his order for further time to rejoin, (a) was not at liberty afterwards to abandon it, and plead otherwise than upon the conditions upon which the time was extended; the defendant was therefore bound to rejoin issuably, and, as he demurred specially, the plaintiff was regular in signing interlocutory judgment.

Rule discharged.

PRACTICE COURT.

EASTER TERM, 6 VICTORIA.

Before Mr. JUSTICE HAGERMAN.

PATTERSON ET AL. v. CALVIN ET AL.

It is not irregular to issue a testatum writ to the Home District, as upon an original writ to an outer district.

This was an application to set aside a testatum ca. re. and arrest thereon, for irregularity, with costs. The irregularity complained of was,

(a) 7 Dowl. 760.

that the plaintiff had issued a testatum writ to the Home District, whereas it was contended that a testatum writ could only issue to an outer district, and not to the Home District.

HAGERMAN, J.—I am of opinion that this writ is perfectly regular. The plaintiff may lay his venue in some other district than the Home District, and if his writ were directed to the Home District, as an original, and the venue were afterwards laid in another district, the bail might be discharged.

Rule discharged.

GIBSON *v.* WASHINGTON.

A rule for judgment as in case of a nonsuit was refused, where, although notice of trial had been given, and countermanded, the similiter had never in fact been added; although the plaintiff had not proceeded to trial within two terms, according to the practice of the court.

Motion for rule for judgment as in case of a nonsuit, for not proceeding to trial according to the course and practice of the court, on affidavit that issue had been joined, and notice of trial given and countermanded, and that the assizes had been allowed to elapse without proceeding to trial. In answer, it was shewn, that although the defendant had sworn that issue was joined, the similiter had in fact never been added.

HAGERMAN, J.—Although the defendant has sworn that issue was joined, yet it is now in fact shewn that the similiter was never added, and the defendant is not placed, by the plaintiff having given notice of trial, in any better position than if such notice had not been given; and, as issue never has been joined between the parties, this rule must be discharged. (a)

Rule discharged.

PRACTICE COURT.

TRINITY TERM, 7 VICTORIA.

Before Mr. JUSTICE MACAULAY.

THE QUEEN *v.* MOODIE, SHERIFF.

Where a sheriff, on being ruled to return a writ of execution, returned it by post to the crown office, but without paying the postage, for which reason it was not filed in the crown office, and the plaintiff, with notice of these facts, obtained a rule for attachment on the usual affidavit of search, the court set the attachment aside; but only on payment of costs, as the sheriff was bound to have paid the postage to make his return effectual.

This was a motion to set aside an attachment against the defendant, for non-returning a writ of fieri facias. The attachment had been granted on the usual affidavit of search, and that the writ of fi. fa. "was not" on the files. It was now shewn that the writ was returned to the crown

(a) 2 Dowl. 632.

office by the sheriff, by post, postage unpaid, for which reason it was not filed in the Crown office, though the letter was received before the search for the writ was made. The plaintiff's agent had notice of the writ being in the crown office, and that it would be filed on paying postage.

MACAULAY, J.—Had the affidavit of search stated all the facts, the attachment would probably have been refused; as it was, the fact stated was strictly true, and the affidavit was according to the forms in the books; I cannot therefore say that the attachment was *irregularly* issued, because *all* the facts were not brought before the notice of the court; and strictly speaking it was the sheriff's duty to have paid the postage, or at all events the plaintiff was not bound to do so, as the sheriff must return the writ effectually. I however look upon it as a sharp, harsh proceeding, and would make this rule for setting it aside, absolute, without costs, if I thought I could treat it as irregular; but as I cannot so treat it, it can only be made absolute on payment of the costs of attachment.

Rule absolute.

THE BANK OF MONTREAL v. EDMUND ET AL.

In a suit against several defendants, it is sufficient to address the notice to appear on each copy of the process, to that defendant alone, on whom the copy is served.

A rule nisi had been obtained to set aside the service of process on three defendants, because the copy of the process served on each was addressed only to that one, and not to all the defendants.

MACAULAY, J.—If this objection had been raised for the first time, I should have thought it better to discharge the rule, but as the notices are in conformity with former decisions, it must be discharged with costs.

Rule discharged, with costs.

BIRD v. MACAULAY ET AL.

Where the plaintiff declared in assumpsit on several counts, and the defendants demurred to one count, and pleaded the general issue to the others, and the same term the plaintiff amended the count demurred to, and, two full days after the service of the amended declaration, signed interlocutory judgment on the whole record, and assessed damages, having first received notice from the defendants of an intended motion to set aside the judgment as signed *too soon*, the court would not afterwards allow the objection that the judgment to the whole declaration was wrong, as pleas were filed to part.

The defendants moved to set aside interlocutory judgment and subsequent proceedings on the ground that the judgment was signed too soon, or the verdict, for want of notice of trial, with costs. It appeared that the declaration was in assumpsit on a promissory note, and the common counts; that the defendants demurred to the count on the note, and pleaded the general issue to the others. The plaintiff had leave to amend his declaration, and on the 10th May served the amended copy, and signed interlocutory judgment, and served notice of assessment on the 13th. The interlocutory judgment was to the whole declaration, no notice being taken of the general issue. On the 22nd May the defendants gave notice of their intention to move against the interlocutory judgment, as signed *too soon*.

There was no affidavit of merits. The amended declaration was filed of the same term as the original.

MACAULAY, J.—The rule is not moved on the ground that the judgment was signed on the whole declaration, though pleas were on the file as to part, and therefore I do not notice that objection ; and the objection as to time fails, as the defendants had two full days to plead, of which they did not avail themselves.

Rule discharged, costs to be costs in the cause.

CLEAL v. LATHAM, ONE, &c.

Where a cognovit was given by one practising attorney and witnessed by another, who was absent from the province, leave was given to enter judgment, upon proof of the handwriting of the defendant and the witness.

Motion by plaintiff for leave to enter judgment on a cognovit, without the usual proof of execution, on affidavit that it was taken through the intervention of Mr. Gamble, a practising attorney of the court, who witnessed it, but who was then absent from the province.

MACAULAY, J.—This cognovit was given by one practising attorney and witnessed by another, and there is no reason to doubt its correctness. The judgment may be entered, on proof of the handwriting of the defendant and the witness.

Leave accordingly.

IN RE. HOME SHERIFF.

Where after a seizure in execution, the parties settle, the plaintiff may apply to the court to fix the amount of the sheriff's fees, but he will not be allowed the costs of the rule, even though no cause is shewn against it.

Duggan moved on affidavit, under 7 Wm. IV. ch. 3, that 1*l.* 10*s.* should be allowed to the sheriff of the Home District, as sufficient fees for travelling twenty-two miles to seize goods in execution, bringing them to town, and keeping them until the cause was settled without a sale. The amount was less than the sheriff's poundage, and Mr. Duggan asked for the costs of the rule, no cause being shewn.

MACAULAY, J.—You may take your rule, but not with costs. As the sheriff is not in any fault, and the motion is for the benefit of the applicant, although, as compared with the amount, an expensive one. In another case hundreds of pounds might be involved, and the principle is the same in all.

Rule accordingly.

BALL v. MCKENZIE.

Where a rule nisi to deprive a plaintiff of costs, under 49 Geo. III. c. 4, was not correctly entitled in the cause, the court allowed an amendment, on payment of costs, by the affidavits filed.

A rule nisi had been obtained by the defendant to deprive the plaintiff of costs, under 49 Geo III. c. 4, for arresting the defendant for more than was due ; and on cause being shewn, it was objected that the affidavits were entitled James Hector McKenzie, while the rule was only James

H. McKenzie, and the defendant therefore prayed leave to amend his rule, and make the title correspond with the affidavits.

MACAULAY, J.—The rule may be amended on payment of costs, and after amendment must be re-served, when the plaintiff shall have an opportunity of answering it on the merits.

Rule accordingly.

THE QUEEN v. BURNHAM.

The proceedings in an ex-officio information may be either at the suit of the Queen or the Attorney-General, but the defendant cannot be called upon to plead in vacation, upon a rule to plead given in vacation; but is entitled to a regular rule to plead, and an imparlance.

An ex-officio information had been filed in this case against the defendant last Easter Term, and an appearance entered by attorney for him, and in Easter vacation a rule to plead in eight days was taken out and served on the attorney, followed by a demand of plea eight days afterwards. The defendant has moved to set aside the proceedings since the demand of plea, on the grounds, 1st, that the information should be at the suit of the Attorney-General, and not of the Queen; and 2ndly, that the defendant was entitled to an imparlance, and regular rule to plead, and that judgment had consequently been signed too soon.

MACAULAY, J.—The defendant having appeared, and given bail to the first process, was entitled to an imparlance, and a regular rule to plead, according to what I take to be the Exchequer Practice in England, or the practice of the Queen's Bench in England, upon informations filed ex-officio by the Attorney-General, and I do not consider that our rules of court abolishing impariances extend to informations ex-officio, and therefore this judgment was signed too soon, and must be set aside. As to the entitling of the rules, &c., it certainly seems that in revenue cases, ex-officio, they are usually entitled at the suit of the Attorney-General, but still they are at the Queen's suit, and my impression is that they may be entitled either way, if uniformity is observed throughout the suit.

Rule absolute.

HILL v. McNAB & BOULTON.

In an action against a person having privilege of Parliament, the declaration will not be set aside for a variance between it and the original bill in a material allegation.

This was a rule nisi to set aside the declaration in an action against two members of the Legislative assembly, for a variance between the original bill and declaration, or to set aside the service of the alleged copy, for being obliterated or mutilated in part, &c. The bill was filed in an action on a bill of exchange, and omitted averment of acceptance as against the acceptor, which was, however, averred in the declaration.

MACAULAY, J.—I have not been able to find that a declaration can be set aside on motion, on the ground that (though it corresponds with the original bill in the nature and cause of the action,) it varies therefrom in a material point or allegation, and therefore I cannot make the rule absolute to set aside the declaration; but the other objection must prevail, and the rule be made absolute for setting aside the service, but

without costs, as more has been embraced in the rule nisi than is now granted (a).

Rule absolute accordingly.

McCALL ET AL. v. CAMERON.

If a plaintiff on verdict is entitled to tax only District Court costs, and the defendant neglects to take out a rule to be present at taxation, the court will not, after the plaintiff has taxed District Court costs, on the motion of the defendant, direct a revision that the defendant's costs of defence may be deducted under the statute.

Motion by the defendant to revise the taxation of costs, and set off his Queen's Bench costs of defence against the plaintiff's District Court costs. The plaintiffs in trover recovered damages to an amount within the jurisdiction of the District Court, and did not obtain a certificate for full costs; they afterwards entered judgment, and taxed costs on the District Court scale, only, the defendant having given them no notice to be present at taxation.

MACAULAY, J.—I think the defendant is too late. He should have regularly taken out his rule to be present at taxation, when he might have attended with his cross bill, and deducted the amount; not having done this, I ought not now to open the judgment for the purpose desired. It is not strictly a revision of taxation; the plaintiff's bill is not objected to, the object is to tax the defendant's cross bill, and deduct its amount; and I cannot now make such a rule.

Rule refused.

THE BANK OF BRITISH NORTH AMERICA v. DENNISON ET AL.

Full costs were allowed in a joint action against the maker and indorser of a note, under 5th Will. IV. ch. 1, where the defendants resided and were served with process in different districts.

Motion for full costs on a note under 40*L.*, in an action against the maker and indorser, under 5th Will. IV. ch. 1; the defendants living in different districts, and having been served there with process.

MACAULAY, J.—On reference to the statute, I think full costs should be allowed.

ARMSTRONG v. BENJAMIN.

It is sufficient to entitle the plaintiff to enter into a peremptory undertaking, after default in not proceeding to trial, that it appears on affidavit, that on some special circumstances he withdrew the record, acting bona fide on counsel's opinion, without any statement of the circumstances.

Motion by plaintiff, (after rule nisi for judgment as in case of a nonsuit for not proceeding to trial pursuant to notice) to enter into the peremptory undertaking, on affidavit that the cause was entered for trial, but withdrawn by the advice of the plaintiff's counsel, given bona fide owing to special circumstances alleged to have arisen, but not stated.

(a) 3 Chit. Prac. 582, 597; 2 Dowl. 33, 49.

MACAULAY, J.—The plaintiff appears to have acted bona fide under legal advice, and may therefore take the rule.

Rule accordingly.

THE QUEEN *v.* JARVIS, SHERIFF.

IN RE SPENCER *v.* SILVERTHORN.

The court will, on special circumstances, relieve a sheriff, by allowing the return of a writ, even after a motion has been made to bring in his body on the coroner's return of *cepi corpus*, to the attachment issued against the sheriff, for not returning the writ.

The sheriff of the Home District had been attached for not returning a writ of *venditioni exponas*, and

Campbell moved, on the coroner's return of *cepi corpus*, to bring in the body.

Gwynne opposed the motion in limine. The *ven. ex.* was returnable on the last day of last term, and the sheriff was ruled in vacation; on the third day of this term, the attachment for not returning the writ issued; and on this day (being the last day of term) the writ was returned with part of the money made indorsed. It appeared on affidavit that there had been several other writs against the defendant, *Silverthorn*, and that the sale of his goods under them had only taken place during this term.

MACAULAY, J.—I at first thought that the writ of *habeas corpus* should issue, but, on consideration, the preferable course seems to be, to treat this as a motion on the defendant's behalf to stay proceedings on the attachment on payment of costs; regularly, he should have made an independent motion to that effect, but the proceedings have been equivalent thereto, and the result is, that I know the *ven. ex.* has been returned. I think that the rule should be that the writ of *habeas corpus* be granted, but that its issue be suspended for fifteen days; and, that if within that time the sheriff shall pay the costs to which he is liable for not returning the writ in due time, including the costs of attachment, and this motion and rule, and pay over the amount returned as made, then the writ shall be permanently stayed.

Rule accordingly.

PRACTICE COURT.

MICHAELMAS TERM, 7 VICTORIA.

Before Mr. JUSTICE JONES.

POWELL *v.* GOTTF.

Where the defendant applied for costs, under 49 Geo. III. ch. 4, the rule was refused; because it nowhere appeared in the affidavits, for what amount the plaintiff had recovered a verdict.

Motion by defendant to deprive the plaintiff of costs, under 49 Geo. III. ch. 4, for an excessive arrest, but it did not appear that the amount for

which the verdict had been recovered was mentioned in any of the affidavits on which the motion was founded, which was urged as an objection against the rule.

JONES, J.—The rule must be discharged, although *primâ facie* it appears to have been a most vexatious arrest on the part of the plaintiff.

Rule discharged.

TAYLOR v. NICHOLL.

Where a person, usually residing in Scotland, came to Canada to settle some affairs, and while here referred some disputes which had arisen concerning them to arbitration, and an award was made against him which was not payable until nearly two years after he had left the province and returned to Scotland, and he had contracted no debts while here: Held, that he did not come within the absconding debtor's act.

A rule nisi had been granted to set aside an attachment issued against the defendant as an absconding debtor. It appeared by the affidavits that the defendant was a resident in Scotland, having land in this province, which he inherited from a deceased brother, upon which the plaintiff had some claim; that the defendant came to this country in January or February, 1841, to effect a settlement with the plaintiff, and that they agreed to refer the differences between them to arbitration; and upon the arbitrators awarding against the defendant, he gave the plaintiff a bond to pay him 100*l.* at a future day, and shortly afterwards returned to Scotland, having remained in this province only four or five months. The bond did not become payable until November, 1842, nor was the defendant shewn to have been indebted to any one in this country at the time he left.

JONES, J.—I do not think that the defendant comes within the absconding debtor's act. He was not an absconding or concealed debtor. He was not, at the time he left this country, a debtor at all.

Rule absolute.

CRYSLER v. CAMPBELL.

A rule nisi for an attachment must be personally served, and the original shewn at the time of service.

Cause was shewn against a rule nisi for an attachment; and it was objected that the service was irregular, as it was not sworn that the original rule nisi was shewn to the party when the copy was served.

JONES, J.—The rule nisi is issued, and served, to bring the defendant into contempt, if default be made; and the original rule should be shewn. The service was irregular, and the rule must be discharged.

Rule discharged.

PRACTICE COURT.

HILARY TERM, 7 VICTORIA.

Before Mr. JUSTICE MCLEAN.

CLUTE v. BADGELY.

Where a plaintiff has given notice of trial and countermand, and afterwards not proceeded to trial according to the practice of the court, the defendant may obtain a rule for judgment as in case of a nonsuit, without any affidavit that issue is joined.

This was a motion for judgment, for not proceeding to trial agreeably to practice. The affidavit stated that notice of trial was given, and countermanded, but cause not brought on, although two assizes for the district of Victoria had since been held; but it did not shew that issue had been joined.

MCLEAN, J.—It does not now rest with the plaintiff to say that the parties are not at issue. The case of *Corbyn v. Hayworth*, 6 Dow. 181, is precisely in point; the other cases cited by *Mr. Wallbridge*, only apply to the time of making application for judgment as in case of a nonsuit. The rule must be made absolute, unless the plaintiff choose to enter into the peremptory undertaking.

Rule absolute.

TELLER v. WILSON.

Where the defendant moved to set aside the service of process, for irregularity in the notice to appear, but the irregularity complained of was neither pointed out in the rule, nor specified in the affidavits, the rule was discharged; but without costs, as it was a preliminary objection.

In this case a rule nisi had been obtained to set aside the service of process, for irregularity in the *notice* to appear on the copy served. The plaintiff objected that the irregularity was not pointed out in the rule, or in the affidavit filed.

MCLEAN, J.—The rule is merely “to shew cause why service of writ should not be set aside, for irregularity in notice on the copy served on the defendant;” but no particular defect in the notice is stated. In *Chitty*, 579,—80, it is laid down that the irregularity must be pointed out particularly, so that the party shall not be left to gather what is objected to, from the whole of the affidavits filed; and in the cases of *Hamilton v. Howcutt*, and *Matthie v. Lewis*, in this court, Trinity, 5 & 6 Vic., Mr. Justice Macaulay so held. I am bound by these decisions, as establishing the practice. The rule in this case must therefore be discharged, *but without costs*.

Rule discharged, without costs.

POWELL *v.* GOTTF.

Where a cause is referred to arbitration, by order of nisi prius, but no verdict taken, the defendant cannot move to deprive the plaintiff of costs, under 49 Geo. III. ch. 4.

The defendant had obtained a rule nisi to be allowed to set off his costs, under the statute 49 Geo. III. ch. 4., against the amount recovered by the plaintiff; on the ground that the defendant had been arrested, without any reasonable or probable cause, for a sum of 350*l.*, when the whole amount due to the plaintiff, and awarded by arbitrators, was only 110*l.*

MCLEAN, J.—The facts disclosed in the affidavits, shew a very strong case in favour of the defendant's application, and if it were one coming strictly within the meaning of the statute, I should have no difficulty in deciding that he should be allowed his costs; but I am unable to discover any authority to apply the provisions of the statute to the circumstances of this case. Here there was a reference at nisi prius of all matters in difference between the parties, without any verdict being taken; and it appears plainly to me, that the statute only gives costs to a defendant when a less sum is *recovered* by verdict than the amount for which an arrest was made, and it is made to appear, to the satisfaction of the court, that the plaintiff had not any reasonable or probable cause for arresting for such a large amount. In this case there is no *recovery* within the meaning of the statute. No execution can issue for the amount of the award, as in ordinary cases where a verdict is taken subject to award; and the defendant could not issue execution for costs, had the award in the plaintiff's favour been for less than the amount of the defendant's costs. The distinction which I have taken is recognized in the case of Beard *v.* Orr, in this court, and in other cases; and I do not find that in any case an application of this kind has been granted. This rule nisi must therefore be discharged.

Rule discharged.

THE BANK OF MONTREAL *v.* HOPKIRK.

Where in a declaration on a bill of exchange, an indorsement was alleged to — Laurie, and — Burns, trading under the name of Laurie & Burns, who indorsed to the plaintiffs, and the defendant demurred specially because the christian names of Laurie and Burns were not set out, the demurrer was set aside as frivolous.

This was a motion to set aside a demurrer to the declaration in this case, on the ground that it was frivolous, and that the plaintiffs have leave to sign judgment. The declaration alleged an indorsement of a bill of exchange, to one — Laurie, and one — Burns, trading under the name of Laurie & Burns, who endorsed the same to the plaintiffs. Demurrer: that the christian names of Laurie and Burns were not stated.

MCLEAN, J.—It might be out of the power of the plaintiffs to ascertain the christian names of the indorsers, and as they derived their interest through Laurie and Burns, it was sufficient, for the purposes of this action, to describe the parties as they appear on the back of the bill; and the addition of the word "one" to each of their names does not affect the question. It would have been sufficient to have stated the indorsement

to Laurie and Burns, trading under that name, and the indorsement by them. I think the demurrer must be regarded as frivolous, and, as the plaintiffs seem to have been thrown over an assize, that they should have leave to sign judgment; unless the defendant makes affidavit that he has a good defence upon the merits, and pays all the costs of demurrer, and of this application.(a)

Rule accordingly.

QUEEN'S BENCH.

CASES DECIDED BEFORE THE COMMENCEMENT OF THESE REPORTS.

HILARY TERM, 4 VICTORIA.

Present,—THE CHIEF JUSTICE,
MR. JUSTICE MACAULAY,
MR. JUSTICE McLEAN.

LISTER v. BURNHAM.

A person receiving money from an agent, on a promise to return it to him, cannot, in an action by the agent to recover it back, set up as a defence that the money really belongs to a third party.

This was an action for money had and received. At the trial, it appeared that the plaintiff had come from Buffalo, for the purpose of obtaining specie for notes of the provincial chartered banks; and that he had deposited 200*l.* of these notes with the defendant, who entertained a suspicion that they belonged to Messrs. Truscott and Green, who, he alleged, were indebted to him, and who, having become insolvent here, had left the province, and were residing in Buffalo. It appeared also, that these notes were in the hands of the plaintiff as an agent only, but it did not appear that the money belonged to Truscott and Green; and the plaintiff refused to say whether it was theirs or not. The defendant had refused to redeliver it; and at the trial, rested his defence solely on the plaintiff's want of a beneficial interest in the money, and his consequent inability to recover. A verdict was rendered for the plaintiff, for 200*l.*, with leave to the defendant to move to enter a nonsuit on the defence urged at the trial.

H. J. Boulton accordingly obtained a rule nisi, this term.

Blake shewed cause.

ROBINSON, C. J.—The defendant in this action has relied, not upon any proof which he has given that the money in dispute belonged to Messrs. Truscott and Green, or to any other person in particular, but simply on the acknowledgment of the plaintiff, that it was not his; and, that he was acting for some other person or persons. No case has been cited to warrant such a defence, and it is evident that none can be. The

(a) *Underhill v. Hurney*, 3 Dow. 495.

confidence necessary for commercial transactions, requires that a person receiving from another money, or goods, in deposit or upon bailment, for any purpose, shall not turn round upon him by whom the trust has been reposed, and put him to the proof of his title. There may be cases, in which the plaintiff's right to recover might be withheld; but not upon a mere surmise or suspicion of this kind, nor for the purpose attempted here. There is no pretence here, that the plaintiff came dishonestly into the possession of this money; no third person, advancing a right, is interposing to check the money in the hands of the bailee; but he, to serve his own interest, claims a right to turn upon the depositor, and inquire into his title. No man could know he was safe in employing an agent, if such a line of conduct were permitted. There is no question here of set-off, or lien, such as the law allows under certain circumstances; and as to the right of this plaintiff, to sue in his own name, whether he has a beneficial interest or not, it cannot be disputed. We cannot presume that he is acting fraudulently; he is, for all that appears, responsible to some person who sent the money by him to this province, in order to have it exchanged, and we cannot justify the defendant in withholding that which he received from him.

Rule discharged.

DOE CREEN v. FRIESMAN.

A demand of possession by a person whose authority is afterwards recognised by the person having title, is sufficient.—In ejectment by a Rector, for glebe land, he must prove presentation, institution, and induction; and if any one of these be wanting, the action must fail.

Ejectment, by the rector of Niagara, to recover possession of the glebe: At the trial it appeared, that the defendant and her ancestor had been in possession for more than thirty years, under a license of occupation from the crown during pleasure; that the rectory had been created by letters patent in 1836, and by other letters patent of the same date, directed "to the Bishop of Quebec, or in his absence to his Vicar General in spirituals." The king presented the lessor to the rectory, and commanded the bishop or his vicar general to induct him. It further appeared, that the archdeacon of York went, and, with several of the clergy of the diocese, inducted the lessor of the plaintiff into the rectory; and that he had been doing the duty since that time. To prove institution, an instrument from the archdeacon was put in, being a mandate to induct, in which was recited the bishop's general authority to him to induct, but that authority itself was not produced; and the seal, said to be the bishop's seal, affixed to the bishop's mandate, was not proved. To prove a demand of possession, the clerk of the lessor's attorney was called, who proved a parol authority to him for that purpose, and that the defendant had refused to deliver up possession. A verdict was rendered for the lessor, with leave to the defendant to enter a nonsuit, if the demand of possession was not sufficient, or the institution not fully proved. A rule nisi having been accordingly obtained by *E. C. Campbell*, for the defendant, and the case argued last term by him, and *J. Hillyard Cameron* for the plaintiff, the court now gave judgment.

ROBINSON, C. J.—I am of opinion that the rule must be made absolute. The objection to the demand of possession, however, I think fails. It is urged that no authority from the lessor to the clerk was shewn; but if the demand was not made with sufficient authority,(a) the lessor has adopted it, and admitted the authority, by proceeding upon it; but the decisive answer to this point is, that the defendant disclaimed holding under Mr. Creen, and refused to go out of possession. It was necessary then for Mr. Creen to prove presentation, institution, and induction. In a suit for tithes, brought by a rector in England, it seems that the formal proof of his right is not necessary; the rector need do no more than shew that he acted as the incumbent of the living, and that tithes had been usually paid to him;(b) though in some cases, I apprehend, this would not be enough; and I see no very good reason why proof of the lessor being the actual incumbent should not be sufficient to enable him to recover possession of the glebe from one claiming no adverse right; and in one case, indeed, where the rector had been fifteen years in the actual enjoyment of the living, he was allowed to recover his glebe in ejectment without proof of institution or induction. Here, however, the rectory has been but recently constituted. In England, we know that the king presents only to some livings, while the right of presentation to others is in the hands of lay patrons and others; yet the crown may acquire the right to present to all, by lapse, when the patron neglects to do so; and it is therefore held, that as against the crown, the living is not full, until there has been a regular institution and induction. A respect for this privilege of the crown, may be a reason for requiring the formal proof,(c) but in this province, the crown has in all cases the right to present; yet I cannot say that we can find, on this difference of circumstances, a different rule of proceeding. The law, in ordinary cases of this description, requires proof of presentation, institution, and induction; here the presentation and the fact of induction are proved, but the intermediate step of institution is wanting. The instrument under which the induction took place, recites admission and institution by the bishop, and authority from him to the archdeacon to induct; but the institution was not proved. To an authority for induction signed by the archdeacon, a seal, purporting to be the seal of the bishop, was attached; but even that was not proved, and the court have no judicial cognizance of it. This defendant has had no pretence of right since this rectory was created, and I have had some difficulty in determining that she is in a situation to put the rector to strict proof of his right; but she is only bound to deliver up possession to the crown, or some person shewing title; and although the crown has presented Mr. Creen, yet that presentation has no effect without institution, which is necessary, as well as induction, to give seisin of the temporalities. It required more care than seems to have been taken in this first proceeding of the kind, to make out a complete case. Hereafter, a knowledge of what we must hold to be necessary, will probably lead to greater regularity.

MACAULAY, J.—In this case, proof of presentation, institution, and induction is required. The first is shewn, by letters patent; the induct-

(a) Roscoe Evid. 436; 10 B. & C. 632.

(b) 3 T. R. 635; 4 T. R. 367.

(c) 2 Inst. 258.

tion is proved by *eye-witnesses* to have been performed by the archdeacon, but of his authority to induct and to institute, there is no sufficient evidence. The institution is certified in the archdeacon's mandate to induct, but the general authority, from the bishop to him, is not produced; if there were no proof of that, then the seal affixed to the certificate would not require proof. The simple question is, whether the want of the general authority to the archdeacon to grant institution and induction, is a fatal defect in the evidence. No authority, beyond the ex-officio power of the archdeacon as such, to institute, or induct, is shewn, it rests on his bare assertion of possessing it; but he only claims it as imparted by the bishop, not ex officio; consequently it should be produced. As to the demand of possession, there was evidence to go to a jury of a disclaimer, and refusal.

MCLEAN, J.—To entitle the plaintiff to recover, he must prove presentation, institution, and induction. The presentation was shewn by the instrument produced; and to prove the institution and induction, an authority was put in, purporting to be from the bishop of the diocese, giving the archdeacon the power to institute and induct; but the seal thereto was not proved to be the bishop's seal, and we can no more dispense with that proof here, than we could in any other case dispense with the proof of an instrument by which a power was given by one person to another. If the authority of the archdeacon had been duly proved, then the fact of induction by him might be shewn by parol testimony, and the induction at the church would be sufficient to carry with it all the rights attached to the rectory, without an entry upon each parcel of land belonging to it; but as the institution is not sufficiently proved, the defendant must prevail.

Rule absolute to enter nonsuit.

THE BANK OF MICHIGAN v. GRAY ET AL.

Where a note is made payable to, and indorsed by, several persons, not in co-partnership, notice to one is notice to all: and where a witness, who was a stockholder in, and also president of, a banking institution, stated in an action brought by the bank that he had released his stock, for a nominal consideration, to the directors, but that he had no doubt it would be restored to him, the court held that the transfer was merely colorable, and that his testimony was not admissible.

Assumpsit on a promissory note, made at Detroit, payable to Gray & Noble, residents there, and to McGregor, an inhabitant of this province, and indorsed by them to the plaintiffs, by whom the action is brought against the defendants as indorsers. A verdict was rendered for the plaintiff, with leave to defendants to move for a nonsuit on the following case. To prove notice of dishonour to the defendants, one Trowbridge was called, who was objected to as incompetent from interest. He admitted that he had been a shareholder and president of the bank until the morning of the day on which he was examined, when he had transferred his shares in the bank to make him a good witness. He did not explain to whom he had transferred, nor produce any evidence of the transfer, which he said was entered in the books of the bank. He admitted further, that he supposed his shares would be re-assigned to him after the trial. His evidence was received, subject to the exception; and he proved that he had given notice of dishonour, in due time, to Gray and

Noble at Detroit, and had put a notice into the post-office at Detroit, directed to McGregor, to the same effect ; he stated, however, that the letter directed to McGregor's place of residence, in Upper Canada, would not be forwarded from Detroit in the ordinary course, unless the American postage was paid upon it, and that he had not paid it. It was further objected, that upon this evidence the plaintiffs could not recover. A rule nisi having been obtained, and the case argued last term, by *J. H. Cameron*, for the plaintiffs, and *Prince*, for the defendants, judgment was now given.

ROBINSON, C. J.—I am of opinion, that if Trowbridge's testimony were admissible, the verdict could be supported against all the defendants, upon the principle, that notice to one or more joint indorsers, is notice to all : they are partners in this transaction ; the payment or discharge of one, is the payment or discharge of all ; and the promise or liability of one, is the promise or liability of all (*a*). Upon the admissibility of Mr. Trowbridge as a witness, I am against the plaintiffs ; and, as the proof of notice rested wholly on his evidence, they must fail on that ground. It is clear, that if at the time of the trial he was really a shareholder in the bank, and consequently a party to the suit, no release would make him a good witness. He admitted that he had been a shareholder up to the very morning of the trial, and no effectual or bonâ fide transfer of his interest to a third party was proved, but the transfer rested on his bare assertion, and was made, without consideration, to the directors of the bank (as it was admitted on the argument), one of whom he himself was, and in the belief that it would be returned to him as soon as the cause was tried. I can find no authority for regarding this as an effectual parting with his interest, and none was cited in argument. The evidence was required for a substantial and important purpose, directly affecting the interests of the parties, and indispensable for establishing their liability. The bank might and should enable themselves to prove such facts by disinterested witnesses—by others than themselves. To receive a witness as competent, under such circumstances, would open the door to manifest abuses. It was not shewn, that by the law of the State of Michigan, respect would be paid to a mere colorable transfer of this kind, which would still leave the beneficial interest in the witness ; and were we to relax the rule of evidence here, we must hereafter apply the same rule to our own joint-stock institutions, and then the interests of all who transact business with these bodies, would be liable to be affected by the evidence of witnesses holding, perhaps, a deep pecuniary stake in the very matters in controversy. There is no necessity for such an improper violation of the principles of legal evidence. In the case of releases given for removing the interest arising from a particular transaction, there is, no doubt, often reason for concluding that the interest is only extinguished in appearance, not in reality, but that cannot be avoided ; and it will be evident, upon consideration, that the cases are not analogous. The cases of corporators, who must be disfranchised before they can give evidence in suits in which the corporation is a party, are more in point ; 1 P. Wms. 595, and 4 B. & Ad. 573, are of this descrip-

(*a*) Doug. 653 ; 1 B. & A. 467 ; 10 B. & C. 122 ; 8 B. & C. 41 ; 1 Camp. 82 ; 6 C. & P. 228 ; 4 M. & Scott, 166 ; 10 Bing. 395.

tion, and the latter is strongly in point to shew that the disfranchisement must be real and effectual.

MACAULAY, J.—The release given at the trial is of no moment; the real question is, whether the witness was a stockholder? If not, he was then a competent witness; if he was, then the release would not qualify, any more than the release of one of several partners would render him admissible, though a co-plaintiff on the record. If interested as a shareholder, he would be virtually, though not nominally, a plaintiff. The transfer was plainly a voluntary assignment, and without consideration; not upon a valid consideration and bona fide, but upon a special trust or understanding that it should be restored. He was cestui que trust of the stock, even though legally transferred to another.

MCLEAN, J., concurred.

Rule absolute.

GOLDIE v. MAXWELL.

One of several partners cannot bind the firm, by a bill drawn in his own name; though for partnership purposes; and semble, that a seal is not necessary to a notarial protest.

This was an action of assumpsit against the defendant, as surviving partner, the plaintiff in his declaration having charged him in three different sets of counts, the first of which was demurred to; in the second, it was alleged that the defendant, and one Wilkinson, whom he survived, drew a bill of exchange in the name of Wilkinson, in favor of the plaintiff, which was dishonoured; and in the third, the defendant was charged, as surviving partner, for goods sold and delivered; and to the second and third sets of counts, the general issue was pleaded. At the trial, there was no proof of any usage to draw bills in the name of Wilkinson; but it appeared that he had purchased staves from the plaintiff, in payment of which he had given the bill declared on, which, on its being dishonoured, he had promised to pay; the bill was a foreign bill, and there was no notarial seal affixed to the protest, and no proof of notice of dishonour to the defendant, and general evidence was given of a partnership. The defendant objected to the plaintiff's recovering on the bill, on the ground of its being drawn in Wilkinson's name alone, and for the want of the notarial seal; and on the common counts, because the bill was taken as payment, and he was discharged for the want of notice of its dishonour, to which he was entitled; and he also disputed the sufficiency of the evidence to establish a partnership. The jury, however, found a verdict for the plaintiff; and J. H. Cameron, for the defendant, moved for a new trial on the objections raised at the trial, and on affidavits shewing circumstances which prevented his making a proper defence on the merits.

Rolland McDonald shewed cause.

ROBINSON, C. J., gave judgment.—We are of opinion, upon the authorities cited, that this defendant cannot be sued as a party to the bill given by Wilkinson in his own name only, there being no evidence to shew that the firm traded in his name only, or that he was authorised to bind the firm by bills so drawn. It becomes unnecessary, therefore, so far as respects the right of recovering upon the bill, to consider whether the protest was sufficiently proved; but I will add upon that point, that I do not find authority for holding a notarial seal indispensable to a protest

made abroad ; clearly, no proof of the seal would be necessary, it can add nothing therefore to the authenticity of the signature ; but all question about proof of protest seems precluded by the evidence of Wilkinson's acknowledgment of liability, after he knew of non-acceptance. As to the defendant's objection, that the plaintiff made the bill a payment, by his omission to give due notice, that resolves itself into the objection that there was not sufficient evidence of a partnership ; because if there was, then notice to Wilkinson would be notice to this defendant, and Wilkinson appears to have had sufficient notice to give recourse upon him. But with respect to the proof of partnership, which is taking the question of liability most broadly upon the merits, considering the evidence upon that point in connection with the grounds on which the defendant has applied to the court, we are of opinion, that justice requires that a new trial should be granted, on payment of costs.

Rule absolute, on payment of costs.

GOLDIE v. MAXWELL.

In a declaration against the drawer of a bill, notice of dishonour must be averred ; and if to excuse such notice, want of effects be averred, it must be shewn that there were no effects from the time of drawing the bill ; and notice must also be averred where the defendant is only a guarantee for the bill ;—and a replication, to a plea stating that a bill of exchange had been taken “in full satisfaction and at all hazards” by the plaintiff, that the bill was dishonoured when due, is bad, on general demurrer, as the plea is an answer to the action.

Demurrer.—The plaintiff in the first count of his declaration set out, that the defendant, and one Wilkinson, purchased staves from him, in payment of which they agreed to give him a bill upon Messrs. Forsyth & Co. of Quebec, in whose hands they said they had funds, at ninety days ; he then alleged a delivery of the staves, and the receipt of the bill, which he negotiated through Messrs. Forsyth & Co., its dishonour by the drawees, and the failure of the defendant, or Wilkinson, to pay ; and also averred, that there were no funds in the hands of the drawees to meet the bill at maturity, but did not allege any notice of dishonour, nor want of funds from the time the bill was drawn ; the other counts to which the demurrer applied were similar, except that the plaintiff averred that the defendant, and Wilkinson, agreed to pay for the staves by draft of Wilkinson. To these counts the defendant pleaded, that after the accruing of the causes of action to the plaintiff, the defendant gave a bill of exchange drawn by Wilkinson, of the same tenor and date as that mentioned in the declaration, for the monies due and owing to the said plaintiff, and that he accepted and received the same in full satisfaction and, at all hazards, and in full payment of the money in those counts mentioned, and fully released and discharged the defendant from the payment of the money, and from his promises and undertakings in those counts mentioned ; to this the plaintiff replied, the dishonour of the bill given, and notice to the defendant ; and the defendant demurred generally. The demurrer was argued last term, by

Rolland McDonald, for the plaintiff, and

J. H. Cameron, for the defendant.

ROBINSON, C. J.—Upon the replications, the defendant is entitled to judgment ; as the plaintiff has therein admitted a case which must be con-

clusive against him. The defendant has pleaded the acceptance of the bill, by the plaintiff, in full payment and satisfaction; and that the plaintiff fully released and discharged him from the payment of the money, and the promises, mentioned in the declaration. If the defendant had given this bill to the plaintiff merely as a mode of paying for the staves, it would have been no payment, unless it turned out to be productive, upon due course being taken with it, both with regard to the drawer and the drawee; and if funds were not obtained upon it, the plaintiff might resort to his original demand; but the plaintiff might, if he would, accept the bill in full satisfaction, and discharge the defendant from his promise to pay, which is what the plea alleges him to have done; and in that case, he clearly can never resort to the original cause of action (except in the case of fraud), but must confine himself to his remedies on the bill.(a) If we look beyond the replication, the judgment of the court must still be against the plaintiff, for the declaration is bad also; there is no averment in any of the counts, that either Wilkinson or the defendant had notice of the dishonour of the bill; nor is it averred that at the time of drawing the bill, and from thence until its maturity, the drawees were without funds of the drawer, or defendant, to meet it; which fact, if it existed, would have made notice unnecessary. It is true that we must not leave out of view the circumstance, that when the person sued is not a party to the bill, notice of dishonour to him has in many cases been held to be unnecessary;(b) but this case does not come within the principle of those decisions. Here, the defendant is charged either as a joint drawer, or as a guarantee for the drawer; notice would be clearly necessary to him in the former case, and it has been held equally necessary in the latter, in Phillips *v.* Astling ;(c) for if Wilkinson, as drawer, had been discharged for want of notice, then if this defendant paid the bill, under his guarantee, he would pay it in his own wrong, and be left without remedy against Wilkinson. How far the substantial defect in the declaration is aided by the pleas in bar, is another question. The general principle is, that defects in substance in the count, are not waived by pleading over; but there seem to be some exceptions to this, and in reason there must be, although the cases are contradictory.—Slack *v.* Bowsal.(d) In this case, it is not easy to gather what the defendant meant by his plea, but the reasonable construction is this: that, admitting the plaintiff's allegations, the bill was to be taken at his own risk; an unreasonable and improbable defence certainly, as it would amount to this, that the plaintiff having a right in justice, and by express agreement, to see that this bill should be paid, or otherwise to demand his money, relinquished that right, and agreed to discharge the drawer of an unaccepted bill from all liability respecting it. It has been urged, that the pleas import that the bill stated in them was a new bill, of the same date, tenor, and parties; but we rather think that the defendant intended by his plea to say, that the bill was given in pursuance of the promise, but that it was without recourse, which would in effect negative the contract laid in the declaration, and amount to the general issue. On the whole, the pleadings are throughout faulty, but the defendant is entitled to judgment.

Judgment for defendant.

(a) Drake *v.* Mitchell et al., 3 East. 258.

(b) 5 M. & S. 62; 8 East. 242; 2 Esp. R. 89.

(c) 2 Taunt. 206.

(d) Cro. Jac. 668.

DOE DEM. SINCLAIR v. ARNOLD.

When the demise laid in ejectment was anterior to the time when the lessor's title accrued. Held, that an amendment in the record to correspond with the correct time was properly allowed at nisi prius.

In this case, the lessor of the plaintiff having laid his demise in his declaration before his title accrued, obtained leave from the judge at nisi prius to amend the demise laid, by inserting a correct day; and the defendant moved, this term, to enter a nonsuit, on leave reserved, on the ground that the judge at nisi prius had no power to grant the amendment.

ROBINSON, C. J.—Having considered the statute 7 Wm. IV. ch. 3, sec. 15, and the several cases which have been decided in England, since the passing of the statute, for the same purpose there, I think the amendment was properly allowed.

MACAULAY, J.—If an actual entry and demise were observed in practice, it must be supposed that they would be stated truly; and if laid on an earlier day, the variance would appear on production of the lease, and be amendable. At present the proceeding is fictitious, but for the purposes of trying the title it is regarded as real; and I certainly consider that a judge who tries an ejectment, has power to amend the demise, by changing the day improperly laid, to a day after the right is proved to have accrued.

Amendment confirmed.

SMALL v. POWELL ET AL.

Where in an action against the maker and indorser of a promissory note, under 5 Wm. IV., c. 1, one defendant pleaded the general issue, and the other allowed judgment to go by default, and at the trial the plaintiff was nonsuited as to both,—no one being present in court on his behalf, the nonsuit was set aside, on payment of costs.

This was an action brought under 5 Wm. IV., c. 1, against the maker and indorser of a promissory note, one of whom had pleaded the general issue, and the other had allowed judgment to go by default; and at the trial, no one appearing on behalf of the plaintiff, he was nonsuited; and he now moved to set aside the nonsuit, on the ground that it was irregular, as one of the defendants had suffered judgment by default, and 5 B. & C. 178 and 768, were cited in support of the nonsuit.

ROBINSON, C. J.—In this case, one defendant having suffered judgment to go by default, the plaintiff, under our statutes respecting the several parties to bills and notes, was entitled to have damages assessed as to him, but might, for all that appears, have been nonsuited as to the other, who pleaded, and we can therefore only relieve him from the effect of this non-suit, on payment of costs.

Rule absolute, on payment of costs.

PHINNY ET AL. v. STEVENSON.

Dollars and cents are not New York currency, within the meaning of the provincial statute.

Demurrer. The plaintiffs declared in debt on a sealed instrument, made by the defendant for the payment of fourteen hundred and sixty-four dollars, and interest on certain days and times, and assigned the non-payment as a breach. The defendant pleaded payment of a part, and that the plaintiffs should not maintain their action against him for a greater sum than 160*l.*, because the covenant of the defendant was made at Hallowell, in Upper Canada, after the year 1822, for the payment of 1464 dollars; which, the defendant averred, was of the currency of the State of New York, or New York currency, and that by force of the statute, the plaintiffs could demand no interest thereon from the defendant. To this plea the plaintiffs demurred, and the demurrer having been argued this term, the court gave judgment.

ROBINSON, C. J.—Judgment must be for the plaintiffs on this demurrer. The defendant has evidently mistaken the effect of our provincial statute 2 Geo. IV. ch. 13, on which he relies; the first clause of that statute is the only one that can apply to the case, and it clearly refers to those instruments only in which the sum of money is expressed to be in “New York currency,” which is not composed of dollars and cents, the national currency of the Union, but the money of account peculiar to the State of New York, to which particular reference is made in the preamble of the statute, and which, it is well known, was a currency distinct from the mode of reckoning by dollars and cents.

Judgment for the plaintiffs.

MILLER v. HAMILTON ET AL.

Where to debt on bond, with a condition that the defendant should permit *or* cause certain goods to be forthcoming at a day of sale, when and wherever the plaintiff should appoint, the defendants pleaded that they did permit *and* cause them to be forthcoming at a day appointed, and the plaintiff replied that the defendants did not permit *and* cause them to be forthcoming at a particular place: the replication was held bad, the undertaking being in the alternative, and it being sufficient if the defendants permitted them to be forthcoming.

Demurrer. Debt on bond,—the defendants setting out the bond on oyer, which, after reciting that the plaintiff, as coroner, had seized certain goods and chattels on a writ of *distringas*, was conditioned, that if H. O. Hamilton should permit the said goods and chattels *or* cause them to be forthcoming at the day of sale, when and wherever the day of sale might be appointed by the plaintiff or his deputy, then the bond should be void;—pleaded, in several pleas, that after the making of the bond, the plaintiff appointed certain days of sale (naming them), and that upon such days the said H. O. Hamilton did permit and cause the said goods and chattels to be forthcoming in manner and form as in the condition mentioned; to which the plaintiff replied, that he appointed the said several days and times in the plea mentioned, for the said goods and chattels to be forthcoming for the sale thereof, at the brick house at Queenston; and that the said defendants, and the said H. O. Hamilton, did not permit *and*

cause the said goods and chattels to be forthcoming at the said brick house, on the days and times in the plea mentioned ; and the defendants demurred to the replication. The demurrer having been argued this term, judgment was now given.

ROBINSON, C. J.—I am of opinion that the defendants are entitled to judgment. The replications are bad, because they assume that the defendants, by the condition of their obligation, have forfeited their bond, if Mrs. Hamilton did not cause the goods to be removed to the particular place where the coroner desired to have them sold ; they aver that she did not permit *and* cause them to be removed to the brick house, &c. ; but the condition of the bond was, that she should permit *or* cause them to be forthcoming. According to the language of the condition, and the reasonable construction of it, it was sufficient if she had the goods forthcoming when required, and made no objection to their removal by the coroner. It was of no consequence, so far as the defendant's undertaking was concerned, to what house or place the coroner might intend or desire them to be taken ; it was enough if they were forthcoming at the house of Mrs. Hamilton. The pleas state, sufficiently, that they were forthcoming there ; and the replications, in requiring more, are not supported by the condition of the bond.

MACAULAY, J.—I think the pleas sufficiently shew performance. I take the substance and legal effect of the bond to be, that Mrs. Hamilton should permit or cause the goods to be forthcoming at any time, upon the plaintiff's call, at the place where they were left in her possession. She undertook to permit, *or* cause ; the breach is, that she did not permit *and* cause. She undertook whenever and wherever the day of sale might be appointed ; the when and wherever relate not to the time and place of sale, but to the time and place, when and at which, such time and place of sale might be appointed. The gist of her contract is, that she should permit them to be forthcoming, or cause them to be forthcoming, at the day of sale ; when and wherever such day of sale might be appointed. She was to permit them to be forthcoming whenever a day of sale was appointed, or at the day of sale ; but I do not consider that she was bound to remove them to the place appointed for such sale, unless that place were her residence, or the place where she had received charge of the goods ; consequently, I deem the demurrer good.

MCLEAN, J., concurred.

Judgment for defendants.

IN THE QUEEN'S BENCH.

EASTER TERM, 4 VICTORIA.

Present,—THE CHIEF JUSTICE,
 MR. JUSTICE MACAULAY,
 MR. JUSTICE JONES.

Weir v. Hervey, Leavitt, and Hervey, Jr.

Nevills v. The same Defendants.

Rapelje v. The same Defendants.

Where an attorney entered an appearance, and defended an action brought against two defendants, who had never been served with process, nor given him any authority to appear or defend for them, nor had any notice of the proceedings, until after a verdict had been rendered against them: the court set the proceedings aside, and ordered that the attorney should pay all the costs.

In all these cases the same parties are defendants, and in the suits of Weir and Nevills, verdicts were obtained for false imprisonment, at the last London assizes, for 150*l.* and 225*l.*, but no trial was had on behalf of Rapeljé. Against these verdicts, Hervey, the younger, moved in his own behalf last term, on the ground that the verdicts were contrary to law and evidence, and for excessive damages; and the other defendants moved to set aside all proceedings subsequent to the issuing of the first process, on affidavits shewing that those defendants never had been served with process, and had never authorized any one to appear for them, or to accept service of process or declaration.

ROBINSON, C. J.—The defendants, on whose behalf the rule is moved, swear positively that they never were served with process, nor authorized any attorney to receive process for them, or to appear for them; that they had no knowledge that appearances had been entered for them, until they heard that verdicts had been rendered against them. They further swear, in affidavits filed by the direction of the court this term, that they had no intimation that any suit was to be brought against them for false imprisonment, until told so casually; that they then only heard, that process had been taken out by some persons in the district of London, against whom Robert Hervey, jun., an attorney of the court, had been proceeding in their name; that they did not know the names of the persons who had taken proceedings against them; and that, although they expected that process would be served upon them, yet none was; and, in consequence, they instructed no one to defend nor appear for them; and that they had no other knowledge of the proceedings against them than the above intimation, until the 21st October last, when they heard that verdicts had been obtained against them; and that, from not having been served with process, they considered that the actions had been abandoned. They further swear, that they had never authorised the attorney,

R. Hervey, jun., to prosecute or defend actions for them generally, though he had been, occasionally, employed as their attorney, upon specific instructions. And what makes their case stronger is, that they also swear, that in October, 1837, they, being then partners trading together as merchants, had failed, and their effects had been assigned to trustees, who, with a clerk appointed by them, managed the affairs of the estate, and that these persons had employed another attorney, and not R. Hervey, jun.; and further, that they did not know that these several plaintiffs had been arrested at their suits, nor had they been arrested by their authority; and that they believe that R. Hervey, jun., who had instituted these actions without their authority, was in embarrassed circumstances, and unable to pay the verdicts which had been rendered against him and them together, for the arrests which had been made by him without their sanction, and irregularly. We have thought it right to call upon the attorney to answer these statements upon oath, and his account of the matter certainly does not weaken the claim of the other two defendants to the relief, which is the object of this application. He states that he was the attorney of Billings, Hervey, and Leavitt, in a suit against Rapelje, Nevills, and Weir, in which he obtained judgment for 400*l.* and upwards; that, thinking it necessary to take out process against these persons, in order to make the debt, he sued out a ca. sa., on which Nevills and Weir were arrested; but, in consequence of a fatal omission in the writ, they brought trespass against him and the plaintiffs in the ca. sa.; that, without instruction from these plaintiffs, or any communication with them, he took on himself to accept process, and defend for them, and was under the impression that Robert Hervey was cognisant of the process, though he does not state any ground for that impression. He adds, that he considers himself in honor bound to save the other defendants harmless, but says nothing respecting his ability to do so. Upon a view of these proceedings and statements, I am of opinion that the rule should be made absolute for setting aside the verdict, in the cases of Nevills and Weir, and all proceedings subsequent to the issuing of the process; and that the rule, for setting aside all the proceedings subsequent to the issuing of process in Rapeljé's case, must also be made absolute. The actions seem to have been appeared to, and defended, without the authority, express or implied, of either of the defendants now moving for relief; there is no general authority shewn, from which an authority to act in these particular cases could fairly be implied. The amount of the verdicts is large; the defendants, for all that appears, have had no opportunity of tendering amends under the statute, and, if willing to defend, they were never served with process, and were even without any certain knowledge of these particular actions being depending. It would be hardly safe, under such circumstances, to leave them to the chance of being indemnified by a recourse against the attorney; and certainly it would be against the course usually pursued in similar cases, to leave them to that remedy, when it is sworn by them that the attorney is not in solvent circumstances, as they believe. With regard to the attorney, it is right that he should pay the costs of this application, and the costs of the plaintiffs for all the proceedings, which will be rendered unavailing by our rule. If we saw clearly any corrupt motives influencing his conduct, it might be proper to take further

steps with regard to him ;(a) but as it is, we leave it to the parties to determine whether they will apply for any proceedings against him, upon any further ground than the affidavits before us at present disclose.

MACAULAY, J., and JONES, J., concurred.

Rules absolute.

DOE MCGILLIS v. McDONALD.

Lands "described as granted" by the Surveyor-General, are taxable, under 59 Geo. III. ch. 7., although no letters patent for them have ever issued. But in ejectment by a sheriff's vendee to recover lands sold for arrears of taxes, he must prove that there was no sufficient distress on the premises to satisfy such arrears, before he can recover. It is not necessary that he should shew that the writ, under which the lands were sold, was in the sheriff's hands for the period required by law.

This was an action of ejectment for Lot No. 30, in the second concession of Kingston. At the trial, the plaintiff made title under letters patent from the crown directly to himself; and the defendant set up a sheriff's deed to himself, on a sale of the land for taxes. It was objected to this defence, first, that no letters patent had issued for the land until several years' taxes had accrued; secondly, that the surveyor-general's schedule or return produced, was not duly authenticated; thirdly, that the writ under which the lands were sold, was not shewn to have been six months in the sheriff's hands. These objections were over-ruled; but a further objection was made, that it was not proved that there was no sufficient distress on the land to answer the arrears of taxes, and on that point a verdict was taken for the defendant, with leave to the plaintiff to enter verdict in his favour, if the court should be of opinion that there should have been proof of no sufficient distress. The case having been argued, the court now gave judgment.

ROBINSON, C. J.—The first of the objections taken at the trial, renews a question which has before been raised under this statute (b), and upon which the opinion of the court has, as I conceive, been fully expressed. Indeed, I do not see how any one, who will take up the clauses of the several statutes and read them consecutively, can have any doubt as to the intention of the legislature. It is the 59 Geo. III., ch. 7, which lays the foundation of the present system of assessment of unoccupied lands, and the principles on which it proceeds are plain. The intention was, that there should be henceforward no exemption from assessment, because the person who would, if occupying the land and residing in the same township, be liable to be rated in respect of it, might happen to reside abroad, or in any other part of the province. To effect this, the legislature did not think it necessary to devise a measure specially and exclusively aimed at absentees: they proceeded upon a broader and less invidious principle, to define what lands should be liable to rates, and when, and to what amount; and, having settled these points, they provided such a system as should secure the payment of the rates so imposed, by making them constitute a charge upon the land, in all cases in which they were not paid to the township collector, and this

(a) *McMartin v. McKinnon*, Hilary Term, 1836.

(b) 59 Geo. III., ch. 7.

without any regard to the distinction whether the owner was or was not an inhabitant of the township, or even of the province. In laying down this system, they direct that every acre of cultivated or arable land shall be rated at twenty shillings, and every acre of uncultivated land at four shillings, and so on, enumerating many descriptions of property, both real and personal ; and they add a proviso (sec. 2), " That nothing therein contained shall extend, or be construed to extend, to any property, goods, or effects, &c., which shall belong to or be in the actual occupation or possession of his Majesty, his heirs or successors, except the crown and clergy reserves actually leased to individuals, which shall be liable to the same rates and assessments as other lands thereinbefore mentioned." Now upon this, an argument has been built, that lands, of which the fee is still in the crown, are not charged with taxes; although such lands may have been located to individuals, and every thing done to assure a title, except the actual completion of the patent. That might be, and perhaps would be, the proper construction to be given to this proviso, if there were nothing in the act to qualify the language used there, and to demonstrate that it was not intended to have that effect. But there is plain enough proof, that the legislature meant otherwise; because in the fourth clause, they declare that "all lands shall be considered as *rateable property*, which are holden in fee simple, or *promise of a fee simple by land board certificate, order of council, or certificate of any governor of Canada.*" Both this clause, and the preceding proviso, apply as much to lands of residents, as of non-residents; and if only lands, for which patents have been issued, could be taxed in the one case, neither could they be taxed in the other. But it is well known, that with respect to resident proprietors, no such doubt has been started. The fact is, that this statute, 59 Geo. III. ch. 7, furnishes no new ground for such a question; for both the proviso and the clause, which serves as a qualification of it, were merely transferred from the former assessment laws, which that act repeals. The 43 Geo. III. ch. 12, and the two subsequent acts of 47 Geo. III. ch. 7, and 51 Geo. III. ch. 8, are in the same terms in this respect; and looking at them all, or at any of them separately, it is plain that what the legislature meant was, that neither the lands in the actual possession and use of the crown, nor its vacant and waste lands, should be taxed; but that lands which the crown had granted to individuals, by order in council or certificate, were, for the purposes of those acts, to be regarded as no longer belonging to the crown, but to the individual, at least until the crown should rescind its order, and resume the lands for some failure on the part of the grantee. Having made all lands under such circumstances, subject to taxes, the next step was to provide for securing the collection of the taxes. With respect to resident holders, the former system of collecting them through the township officers, was continued; and in the twelfth and some following clauses, the legislature lay down a system for ensuring their being paid also by non-resident proprietors; and this was by directing an account to be kept against the several lots made rateable by law, and authorizing the levying the arrears of rates by distress, whenever distress might be found upon the land. Now it will be quite clear to any one who reads the act, that the legislature meant, that, by the one mode or the other, all lands liable to rates according to the act they were passing, should be made actually to contribute them; and the only occasion for treating the subject

in different aspects at all, arose, not from any distinction intended to be made with respect to the lands of resident or non-resident owners, as regarded the liability to taxes, but from the necessity of devising some means of reaching persons whom the assessors could know nothing of, and whose names consequently would not appear upon the township rolls. To supply the means of keeping an account of accruing rates, it was necessary to ascertain in the first place, what lands were liable, and from what period; in other words, according to the fourth clause, what lands were holden in fee simple or *promise of a fee simple*, by land board certificate, order of council, or certificate from the governor of Canada; and when they began to be so holden. To afford the proper district officer this information, was the object of requiring from the surveyor general the return mentioned in the 12th clause; not a return applying to non-resident land-holders only, but to all indiscriminately;—in other words, a return applying to the lands, without regard to the circumstances of the respective holders. With this return before them, the proper officers, by comparison with the collector's rolls, can check those lots on which the taxes have been paid to the collector, and charge the arrears against all the other lots, which are made liable by law, without enquiry whether the proprietor lives in the district or out of it. The surveyor general alone could furnish such a return as would suit the preceding enactments of the statute. The secretary and registrar could only report what patents had been completed; and if the district officers were to go by his return, then many lots of absent proprietors would escape, though the act had clearly made them rateable; and a distinction would be drawn between the resident and non-resident holders, such as the legislature did not intend. On the other hand, the clerk of the executive council could not have furnished the desired information; he could only return the quantity of lands ordered to be granted, and to whom; the particular lots granted are in general unknown to him. The surveyor general, and he alone, could state for what specific lots or pieces of land a promise of fee simple had been given, and to whom, and when, and upon what authority. It was to him therefore that the legislature looked for the desired information, which was to furnish the basis of the whole system. But it did not escape attention that when this system should come to be applied in practice to lands of which no person was in actual possession, or exercising over them any visible ownership, it would not always answer to take it for granted that every promise of a fee simple which the crown had given, was a continuing and still subsisting promise. Lands might be located to discharged soldiers and others, who, after a lapse of years might be no more heard of; or the persons locating might neglect or wholly abandon their locations, performing none of the conditions on which they were made; or they might receive other grants in lieu of those first located; or it might, in some cases, be discovered that a location which had been made would interfere with some vested interest, public or private, so that it could not be confirmed. These things the legislature well knew were frequently happening; and they knew also that before the surveyor general issued his description of the land, for the purpose of having it inserted in the patent, all preliminary points were understood to have been ascertained, and the location recognised as free from difficulty; they therefore, in the act, required the surveyor general to state in his return

to whom each particular lot was "*described as granted by his Majesty;*" and they provide "that all lands (so) described in his schedule as *having been granted*, should be assessed and charged with the payment of rates and taxes, whether the same be occupied at the time of assessment or not." In using the terms "*described as granted,*" and requiring from the surveyor general a return of such lands as had been "*described,*" the legislature knew that they were using a term familiar to the public, and of which the precise meaning and effect were well known to all who were conversant with the routine of the land granting departments in this province, which form part of the executive government of the country. They know, as we all know, that the surveyor general's description is a public document issued by him, from which the patent is filled up and prepared; that it begins with the word "*grant,*" and furnishes a particular account of the grantee, the lands granted by metes and bounds, and other matters to be inserted in the patent. When this issues to a grantee, he has only to follow up the instrument to its completion, through the several offices, which is a mere matter of routine, all questions regarding the grant having been previously cleared up. When the surveyor general is asked whether any given lot of land has been "*described,*" he knows perfectly well that he is expected to state whether he has made out such a description for it as I have spoken of, and he answers accordingly. There is no doubt in his mind of the meaning of the word "*described.*" The judges of this court know equally well what is meant by it, when, in obedience to an act of the legislature, they sit as commissioners under what are called the heir and devisee acts. The legislature used the word in its well understood sense; and we are as much bound to carry their acts into effect, by giving to the terms which they have used their known meaning, in reference to the subject matter, as we are in all other cases. I consider it then to be clear, that the statute 59 Geo. III. ch. 7, authorizes lands to be charged with taxes, after they have been "*described,*" whether the party has delayed, afterwards, to take out his grant or not; thereby forbearing, for the reasons which I have stated, to make the lands chargeable at so early a period as they had been chargeable under previous acts, but still not forbearing to tax them until letters patent were actually sealed. The legislature took a sort of middle course, which, in some particular cases, may very possibly be attended with difficulty, and inconvenience; but it was necessary to lay down a rule, and if this were on the whole the one liable to fewest exceptions, it is as much as can in general be attained in legislation. If the legal question be so far clear, (as I think it is), there can be no doubt, upon reading the subsequent statute of 6 Geo. IV. ch. 7, which first authorized the sale of land for taxes, that, according to the provisions of that statute, all lands which the former had made chargeable, are, by that act, expressly made liable to sale, if necessary, in order to enforce the payment; at least all lands not coming within the exception of the fifteenth clause, which relates to crown and clergy reserves only. I see throughout that statute every evidence of such intention, and nothing to the contrary. It has been urged that it is incongruous, and must lead to embarrassing consequences, to have land sold for taxes, while the legal estate has never been divested from the crown; but the act has been many years in force; it is well known that much land has been sold under it, for which no patent has ever been completed, and

no evils have been pointed out to us as having arisen in consequence. But if it were otherwise, our judgment upon the legal construction of the statutes could not be governed by that consideration; the legislature must look to it. If we find that, according to the intent and letter of these acts, lands are liable to be sold under such circumstances, there can remain but one question for us to consider; and that is, whether it was competent to them to make such enactments. I do not know on what grounds it could be denied that such an act is valid, whatever individuals may formerly have thought of the propriety and expediency of colonial legislatures passing acts directly affecting the right of the crown, in the waste lands of the colony, and controlling the manner of disposing of them. What has of late years been done on that head, not only with the sanction, but upon the invitation of the British government, seems to place those matters on a new footing; and as to the question of strict legal validity, it would be difficult to maintain, by any argument, that what the lieutenant governor may do in the name of the king, by an instrument under the seal of the province, could not equally be done by him in conjunction with the other branches of the legislature, by a solemn legislative act, or rather done by the king himself, in conjunction with the two branches of the provincial legislature, as was the case here; for this bill was not assented to in the colony, but was reserved for his Majesty's consideration, and the royal assent afterwards promulgated by proclamation. Whether this bill was considered to come within the provisions of the forty-second clause of the 31 Geo. III. ch. 31, and an address in consequence passed, such as that clause in some cases requires, we are not informed; but I am of opinion that such a formality was not necessary, inasmuch as the bill did not affect the king's prerogative, touching the granting the waste lands of the crown. On these grounds, I think the first objection taken, that there was no patent for the land, when part of the arrears accrued, cannot hold. The second objection is, that the surveyor general's return was not properly authenticated. It was, I think, sufficiently proved. It was shewn to be the public schedule bearing the surveyor general's signature, handed over by the late to the present treasurer; it was in the proper custody, and there was nothing to throw suspicion upon it. As to the third objection, that the writ was not shewn to have been six months in the sheriff's hands, the purchaser at sheriff's sale, can never, I think, be required to prove that; indeed he has no actual means of shewing when the sheriff received it. Supposing the evidence given to have furnished no reason for contrary inference, it will be presumed, in the first instance, that the sheriff's proceeding with respect to the time and mode of sale, was in accordance with the act. Nothing may be presumed which is necessary to make the land liable; but after the writ has legally issued, what the sheriff does in obedience to its direction, will, as in other cases, be supposed to have been rightly done, until the contrary is shewn. The main objection on which leave was reserved to enter a verdict, is yet to be disposed of; the question is, whether the defendant, making title under the sheriff's deed of land sold to him in order to satisfy an arrear of taxes, was not bound to give evidence, as part of his title, that there was no distress upon the premises from which he could have levied the money directed to be made by the

warrant. In the case of Doe ex dem. Bell *v.* Vraumer, (*a*) in this court, the same question was raised; but it became unnecessary to decide the point, because it was clearly shewn in that case, by evidence on the other side, that there *was* sufficient distress on the premises; and also that these taxes were not eight years in arrear; on both of which grounds expressly the court held the sale to be invalid, and on those grounds alone. But in that case, it was strongly intimated, that to prove the non-existence of sufficient distress upon the premises, was in such cases a necessary part of the evidence to be given by a party making title under a sheriff's deed of land sold for taxes. It was remarked, in giving judgment in that case, "that the command contained in the writ to the sheriff is, to sell the land, *provided there be no distress thereon from which the money can be made, and, if there be such distress there, that the sheriff shall levy the same by such distress.*" If the writ had run in any other form, it would have been bad; for the statute expressly requires that it shall issue in those terms, and it only authorizes the land to be sold where there is no distress. To sell the land, therefore, where there is distress upon the premises, is to act against the command of the writ, not under its authority; and clearly a sale so made cannot be supported. It might as well be said, that if a sheriff, upon an execution against the lands of A., should sell the lands of B., the sale must be valid, because he seized and sold them as the lands of A., and published the requisite notice of the sale. The operation of the statute is to work a forfeiture; an accumulated penalty is imposed for an alleged default; and to satisfy the assessments charged, together with this added penalty, the land of a proprietor may be sold, though he may be in a distant country, and unconscious of the proceeding. To support a sale made under such circumstances, it must, in my opinion, be shewn that those facts existed which are alleged to have created the forfeiture, and which are necessary to warrant the sale. If it were otherwise, then a mere clerical error in a ministerial officer, in substituting one lot for another, as well as his wilful misprision, or negligent omission, might deprive a man of his estate, when no circumstances had occurred to warrant the sale." We are now driven to decide the question which was thus touched upon in Doe Bell *v.* Vraumer, and in my opinion, the defendant ought to have given some evidence of want of distress; I say *some* evidence, because, though I think an *onus probandi* is thrown upon him, yet *prima facie*, and according to the circumstances, a general description of evidence may suffice in the first instance, to throw it upon the other side to prove the contrary. I mean that the court and jury, acting on a principle recognized in similar cases, would not be unreasonable, and exact evidence of that minute and perfect kind, which might exclude all probability of doubt, and such as a purchaser might frequently be unable to supply. But there could be little difficulty in proving that the land had been unoccupied before the sale, or had been abandoned. In the total absence of any proof of the kind, I think the defendant did not support his title; and that a verdict should be entered for the plaintiff.

MACAULAY, J.—I think that the objections, which were overruled at the trial, were correctly overruled, as the schedule from the surveyor

general was not contradicted nor impugned ; and I apprehend that proof of the delivery of the writ to the sheriff, six months before the sale, was not essential ; but I am of opinion that the absence of any proof of want of distress, is a fatal objection, on the authority of *Doe Bell v. Vraumer* ; at least of the opinion then expressed by me, and which I still entertain. The want of distress is a condition precedent to the power of sale.

Rule absolute to enter verdict for plaintiff.

DREW ET AL. v. BABY.

In an action on the case by reversioners for a serious injury to their reversionary interest, by the erection of a nuisance in a public highway, the jury are not necessarily restricted to a verdict for nominal damages on the first trial, but may give damages commensurate with the injury which the plaintiffs may sustain by the possible continuance of the nuisance.

This was an action on the case, for injury to the plaintiffs' reversion in a house occupied as an inn, by one Lawson, their tenant, and in a shop occupied by another tenant. There were several counts in the declaration, charging an obstruction, by a house erected by the defendant on a certain highway, to the plaintiff's windows and lights, and preventing access to the inn and shop, whereby the business of the one was lost, and the other was abandoned by its tenant, and by reason whereof the plaintiffs were damaged in their reversionary interest. The defendant pleaded the general issue. It was proved at the trial, that, for more than twenty-five years, there had been a common highway leading over land of the defendant, from the main road along the Detroit river, to the ferry ; and the road had, during that period, been in common use by the public, for persons, horses and carriages, in as unrestricted a manner as any other highway. On one side of the road, leading to the ferry, the plaintiffs' inn is situated. It has not been built twenty years ; but was built and had been occupied for some time before April, 1836, when House, the then proprietor, sold and conveyed it to these plaintiffs, having contracted to sell it to them some months before. It was proved, that the defendant was seized in fee of the land which formed the highway, and which he had acquired after the road was first opened ; and that, about 1836, he had erected a house on that road, for the purpose of stopping up the access to the ferry by it, he himself having an inn on the opposite corner to the plaintiffs' of this same road. The road by the plaintiffs' inn was thus blocked up, and persons could not pass to the ferry by the side of it as they could have done before, and all access to the plaintiffs' shop was cut off, the defendant having also opened a new road on the side of his own inn, furthest from the plaintiffs', and diverting the business from the plaintiffs' inn, as only a very narrow passage way had been left where the road had been before, not traversable for carriages. The defendant had also erected a screen of boards, which shut out the view of the road from the plaintiffs' inn ; and, by the erection of this screen and of the house, the air and light could not pass so freely to the plaintiffs' inn as before. The defendant sold the inn, which the plaintiffs now own, to one House, who sold it to the plaintiffs ; but it was in the time of House that the defendant erected the obstruction, for which House preferred an indict-

ment against him at the quarter sessions, which the defendant removed into the Queen's Bench before anything was done upon it. Afterwards, and before the sale to the plaintiffs, House, in consideration of 2*l.*, released to the defendant all actions, cause and causes of actions, suits, controversies, &c., and demands whatsoever, for or by reason of a suit at law, incited by him under petition to the quarter sessions, in July last, concerning a road or way between the said François Baby's house, near the ferry, and his house, for the recovery of the said road or way, or any other matter, cause, or thing whatsoever, from the beginning of the world to that day; and this release was relied upon by the defendant, as disabling the plaintiffs from bringing the action. The case having been argued last term by *Prince* for the plaintiffs, and *J. H. Cameron* for the defendant, the court gave judgment.

ROBINSON, C. J. (after stating the case as above).—The first question is, has this release the effect contended for? We think it has not; and so it appeared to me at the trial. Its production, in order to bar the action, had an unfavourable appearance, and probably may have had some effect with the jury. House had some time before bought the land of this defendant, and was then about transferring it to these plaintiffs, on a contract previously made. If he really designed, by giving a paper of this kind to the defendant, to deprive the persons, who were about purchasing from him, of all power of obtaining compensation for an injury that made the property almost useless, it was certainly a very unfair proceeding. If, on the other hand, this defendant, knowing that it was not intended to have such an effect, still advanced it for that purpose, that made the proceeding still more unfair. It is plain, however, that it is only a discharge of the prosecution, (so far as House could discharge it), which had already been commenced by indictment for the nuisance, and a release of whatever rights of actions House might then have against this defendant. It does not prevent these plaintiffs from bringing this action for damages sustained by them as owners of the fee. Then, as to the grounds of this action, the locus in quo was established to be a highway by abundant evidence of dedication. It had been a highway before the defendant became the owner of the property; and, for more than twenty years afterwards, was constantly in use as a highway of the most common and public description, leading to a ferry in constant use, and traversed by horses, carriages and persons; and that the plaintiffs' inn was built upon the side of this public way. There can be no doubt, on these facts, that the act of the defendant was a public wrong (in building across and blocking up that highway), committed in defiance of the plainest right—and committed, as it appeared, for no other intelligible reason than to divert the travelling, and consequently the custom, from the inn (for which the plaintiffs had paid a high price) to his own; thereby seeking gain to himself by a very unjustifiable disregard of the rights of others; for he opened, at the same time, a new road to the ferry, on the other side of the inn owned by himself. If, by this public wrong, the plaintiffs have sustained any special damage, then, I think it clear that they have a right of action. The damage on account of which they claim is the impeding the air and light, the destroying the access to and from the ferry (as respects their inn built upon the old highway), and the consequent loss of custom, and deterioration in value. In this case, I think, there is no necessity for shewing the lights obstructed to be ancient

lights, because the defendant had no right at any rate to put up the house in the highway, and whoever suffers more than others by that public wrong, may sue for the damage or inconvenience; and, besides, it was consistent with the defendant's own implied assurance that the land which he had sold upon that highway should be free from obstruction. The only question that remains is in regard to the damages—the jury gave £250. The plaintiffs, as owners of the reversion, might bring their action for injury to the reversion before they felt any damage; that is now clear on the adjudged cases, and upon this principle, that if they were compelled to wait till the occupation returned to them, they might, in many cases, lose their remedy in effect; it is therefore only a question as to amount. Has the jury done right in finding substantial damages in this case, or, were they restricted to nominal damages; and if not so restricted, yet are the damages found excessive? It is material to consider whether they were misdirected in this respect. During the trial, I was much in doubt what direction to give them upon this head; it seemed to me to require consideration, that the nuisance might be abated beyond doubt by a proper proceeding, and even by the plaintiffs themselves; on the other hand, I could not say that, on that account, the damages should be merely nominal. 2 B. & Ad. 97; 1 M. & M. 350; 3 C. & P. 315, to which I was referred by the book on evidence before me at the time, seemed to entitle the plaintiffs to such damages as the jury might think it fair to give. On the whole, I told the jury that if it were not for the probability of the nuisance being soon removed, the true measure of damages would be, the difference in value between the property in its present and its former state; that I could not say that that, in fact, would not be a right measure of damages, even now; or, that their verdict would be against law, if so rendered; but, on the other hand, if they should find damages very much within that, I should think it not wrong; and so I left it to them, with such remarks as seemed to me just. They found something less than the difference of value, and I think their verdict was reasonable, and more easy to be sustained than that to which I have referred. I have no inclination to relieve against it; the defendant was bound to consider the rights of the public, and of his neighbours; and, in doing so extraordinary and reprehensible an act, he proceeded at his peril (*a*). The jury, on a former trial, assessed the damages in an undefended case at 400*l.*, and, I think, 250*l.*, on the evidence, not an unreasonable recompense for the deterioration as the matter stands. I attach no importance to this being the first action, and no nominal verdict having preceded it establishing the right; for I think the defendant required no such warning that the plaintiffs would not acquiesce in an act so ruinous to their property; and here there may be a lasting injury to the reversionary interest, from the diversion of custom to the defendant's inn, which seems to have been the object; and that custom may never wholly return, even if the road is reopened.

MACAULAY, J.—I understand, by the notes of evidence, that originally, the defendant owned the land on both sides of the obstructed way, and that the plaintiffs' house is built on a lot purchased of, and conveyed by,

(*a*) Lord Raym. 406; 2 Bing. N. C. 288; 4 M. & S. 101; 2 Bing. 263;
4 B. & Ad. 72, 278; 2 B. & Ad. 97; 3 C. & P. 615; 1 M. & M. 350.

the defendant. If so, I think that a right of way, with all the enjoyments as to access, light, &c., was impliedly granted, though I should not be prepared to say so if the plaintiffs held under other owners, and the defendant had always been a stranger to the soil. I think the plaintiffs are entitled to recover strictly on a private right, as if no public easement or right of way existed, and the land, on which the nuisance was erected, was exclusively the defendant's private property. I do not see that their claim for redress is aided or enhanced, by shewing the act complained of to be also a public nuisance; in other words, by shewing that, in other respects, the defendant was a wrong-doer. The public easement super-added no peculiar private right, beyond the privilege which such public right conferred; any such right is derived from the implied grant, from the title the plaintiffs derived and held under the defendant; and I conceive no distinction to arise, owing to the defendant being still owner of the soil. The question is then reduced to the point of damages. The cases already cited by the Chief Justice shew, that the plaintiffs, as reversioners, may recover; and as to the amount, the damages are usually nominal, when the object is solely to try a right, and no substantial injury has been sustained; but increased afterwards in a second action, if, after the right is established, the defendant perseveres in continuing the nuisance; but they may be substantial in the first instance, where the exigency is pressing, and the jury feel impelled to coerce the defendant promptly to remove the nuisance. It is both a public and private nuisance, and a private nuisance of a most selfish and vindictive kind. As to mere private remedy, the plaintiffs, instead of violently abating it, have sought legal redress, and the amount of that redress was in the discretion of the jury, under all the circumstances. The plaintiffs may bring another action for the continuance of the nuisance, according to 4 B. & Ad. 72. It is said to be usual for the tenant to undertake to bring no action; and there are cases to shew, that if the defendant abate the nuisance, the court will reduce the damages. It is not urged here, however, that the nuisance is abated.

JONES, J.—For the injuries to the reversionary estate of the plaintiffs, as set forth and proved by them, an action lies against the defendant; and whether the nuisance was erected on a public highway granted by the crown, or a road dedicated to the public by the defendant himself, the defendant being a wrong doer, is answerable to all the Queen's subjects, for any special damages sustained by them individually, and liable to a public prosecution, by which he may be compelled to abate the nuisance, and for all the grievances alleged in the declaration. An action would also lie by the tenants in the occupation of the premises for the same period, and they, in fact, are the persons substantially aggrieved. It is not alleged or proved, that the plaintiffs lost the sale of the premises, or that the rents and profits arising from them are in any manner lessened, so that no injury in fact was sustained by them. The witnesses swore that, with the existing nuisance, the value of the property was lessened from 250*l.* to 500*l.*; but when we consider that the defendant, by a public prosecution, may be compelled to abate the nuisance (and such a proceeding was in fact taken by the former owner, House), and that the plaintiffs may themselves abate it, and also that they may, at any time, bring another action for a continuation of the nuisance; and fur-

ther, that the defendant is liable to compensate the tenants for the actual damages sustained by them, and for which the plaintiffs have, in fact, recovered in this action, the damages found by the jury are, in my opinion, outrageous and excessive, and ought not to stand. Although the conduct of the defendant was wanton and aggravated, there is no doubt that he considered the road as his property, and that he was justified in stopping it up. He should, however, have tried his right first, by an action of trespass against any person using the road; but, having erected the building, the more correct course for the plaintiffs to have pursued, would have been by indictment; but as they have proceeded by action, and do not shew that they have sustained any real injury, I look upon this as an action to try the right, and that they should receive nominal damages only; but if the defendant continued the nuisance, then, in a subsequent action, the plaintiffs should recover large damages. If this verdict is permitted to stand, the plaintiffs will recover 250*l.*; they may institute another action for a continuance of the nuisance to the present time, and the tenants may also recover for the damages actually sustained by them, when it is obvious that the inheritance will be in no wise injured upon the abatement of the nuisance. It may be said that, as the action lies, the measure of damages is in the discretion of the jury; so it is, to a certain extent; but when an action is brought for the purpose of ascertaining and settling a disputed right between the parties, and when no actual damages are proved, the verdict is invariably nominal. This action is for an injury to property, giving some data whereby to calculate damages, not like an action for slander, or other actions sounding wholly in damages. The cases in the margin (*a*) establish the right of action, and that the damages should be nominal. I think that the jury should have been directed to find nominal damages, but it having been left to them to find such damages as might compensate the plaintiffs for the injury sustained, there should be a new trial without costs, unless the plaintiffs consent to reduce their verdict to a nominal amount.

Rule discharged (JONES, J., dissenting).

BRADBURY v. DOOLE.

A promissory note made in Upper Canada, payable in Montreal in Lower Canada, is an inland note, being in effect payable generally under our statute 7 Will. IV. ch. 5, and may be properly protested on the day after the third day of grace.

Assumpsit, by the indorsee against the indorser of a promissory note drawn in Upper Canada, by one Ross, payable to defendant's order, at the office of the plaintiff, in Montreal, in Lower Canada. It was there at maturity, but there were no funds to meet it, and the balance in the plaintiff's books was against the maker. Notice of non-payment was admitted at the trial, and it was proved that it had been protested, the day after the third day of grace. The defendant objected, that the mere want of funds was no dispensation of formal presentment, which was not

(*a*) Holt. 543; 7 Bing. 682; 7 T. R. 529; 4 M. & S. 101; 2 Bing. 263; 4 B. & Ad. 72; 2 B. & Ad. 97; 3 C. & P. 615; 1 M. & M. 350, 404; 1 M. & S. 234.

sufficiently shewn by the allegation, that it had been at the plaintiff's office; and that the protest was too late. A rule nisi having been obtained for a new trial, and the court having heard the argument now gave judgment.

ROBINSON, C. J.—The note having been made in this province, payable in Montreal, was in its creation an inland note, being in effect payable generally by virtue of our statute 7 Will. IV. ch. 5, but the holder of the note, availing himself of the place of payment, mentioned in the note, makes no demand upon the maker himself, but takes the note to the place where it was made payable, and makes the demand there, for the purpose of charging the indorser, the now defendant. This being the only demand made by him, he must give such evidence of that demand, and of the non-payment upon it, as the law requires. Now an inland note of this province, made and payable here, which this note really is, is, by analogy with inland bills, to be protested on the day after the last day of grace, according to 9 & 10 Will. III. ch. 17; and the fact of non-payment need not be proved by a protest. The plaintiff, by his course of dealing with this note, is obliged to prove the fact of its having been presented for payment in a foreign country, and that presentment not being by demand on the maker himself, but by presentment at a place of business, I think the usages of commerce permit, if they do not require, that to be proved by a notarial act, in order that we may have the best evidence that a proper presentment was made, according to the system of transacting such business in that foreign country; because, otherwise, the maker of the note might be assumed to be in fault, when he was not. I think, therefore, that the notarial act was properly received in this case; and I further think, that such notarial act having shewn the note to have been protested on the same day, when, according to our law, as I take it, it should be, that is, on the day after the third day of grace, we must hold that to be right; in the absence of any ground being shewn for holding otherwise. We should presume, I think, that the notary was cognizant of the law of the foreign country in which he was acting, and that he conformed to it; the law, for the safety and convenience of commerce, places faith in his acts. It is shewn to us, by affidavit, that the law of Lower Canada allowed a protest after the third day of grace, and until the expiration of the sixth day, (evidence of which was offered at the trial, but refused, as, being alleged to be by statute, it could not be proved by parol); and consequently that the note was duly presented, and protested. I think that the notary, as being officially consonant of the law, might (if it were necessary, which I am of opinion it was not,) have been allowed to state what the direction of the law was, so as to support his protest, without producing a copy of the statute; but it is not necessary to decide that question. I think that the rule should be discharged.

MACAULAY, J.—Promissory notes were not, by the law of merchants, on the same footing as bills of exchange; and inland bills of exchange were not liable to protest, like foreign bills, till the 9 & 10 Will. III. ch. 17, authorized their protest the day after the last day of grace. The statute 3 & 4 Anne, ch. 9, afterwards placed promissory notes on the same footing as inland bills; so that domestic notes, by analogy, are regularly protested the fourth day, or the day after the last day of grace; and this must be intended to be the law in Lower Canada as well as here, until the

contrary is shewn. The note is proved to have been presented on the third day, and protested on the fourth; and notice of non-payment, (which seems to include or admit the regularity thereof), is admitted. If a notice of non-payment, without notice or copy of the original protest, would be insufficient, and yet the defendant admits receiving notice of non-payment, does he not waive all objections to the sufficiency of such notice? At all events, although it has been held that notice of non-payment of a promissory note on the third day of grace is not too soon, yet it would also seem that it cannot be regularly protested until the fourth day. It is not usual to protest them at all, and I am by no means satisfied that in this case any protest was necessary. I have examined a number of cases arising upon notes made abroad, and in the forms of the declarations in the books of pleading, I do not find that a protest is ever alleged of notes, domestic or foreign, or the expenses thereof demanded. If a protest were necessary, which I doubt, I think that by the laws of this province, it was not too late on the fourth day, as a domestic promissory note. As to foreign notes, I find no express law merchant on the subject; but the law of Lower Canada is said to coincide with ours on the subject of protesting promissory notes. I therefore think that the verdict was right.(a)

Rule discharged.

LOCKHART v. MILNE.

Where a verdict was taken for the plaintiff in an undefended cause, and no application was made to put off the trial, the court nevertheless granted a new trial, on an affidavit of merits, and special affidavit of circumstances.

The defendant moved for a new trial, on payment of costs, on the ground that he was absent from the trial of the cause without his own fault; that himself and his witnesses were attending a naval court martial at Quebec, and, that he had a good defence on the merits. No application had been made to put off the trial at the assizes.

ROBINSON, C. J.—The circumstances here are out of the ordinary course; the probable duration of the court martial was unknown; and it would be hard, in such a case, to deny the defendant an opportunity of being heard.

Rule absolute.

O'REILLY v. ARMSTRONG.

Where in an action against an attorney for false imprisonment, under a writ alleged to be void, the plaintiff produced the writ to connect the attorney with the arrest: Held, that the attorney could not justify under the writ so produced by the plaintiff, without a special plea.

Trespass against the defendant, an attorney, for false imprisonment. The declaration contained four counts; to one of which there was a special plea, which was demurred to, and the general issue to the whole declaration. The defendant had issued a ca. sa., on a judgment for 2l. 10s. 6d., damages, and 27l. 9s. 2d., costs; the statute 5 Will. IV. c. 3,

(a) See Rothschild *v. Currie*, 1 A. & E. N. S. 43.

s. 2, prohibiting an arrest on judgments, where the damages do not amount to 10*l.*, exclusive of costs. On the trial, the plaintiff put in the writ, and the defendant contended he was entitled to justify under it, when produced, although not specially pleaded. This was overruled, and verdict given for the plaintiff, for 90*l.* The defendant obtained a rule nisi to set aside the verdict on that ground, for excessive damages, and that the verdict was entered generally on the whole record, which was incorrect.

ROBINSON, C. J.—It has been already decided in this court, that the production of the writ by the plaintiff, does not make it evidence to support the arrest, unless it has been pleaded as a justification ;(a) and the ca. sa. here was void on its face, as it directed an arrest where the law said there should be none. There was a verdict against the defendant at a former trial, for 60*l.* The plaintiff is a merchant of respectable character; he was imprisoned wrongfully; and we cannot relieve the defendant by granting a third trial for excessive damages, without transgressing rules. With respect to the verdict being general, one trespass only was proved; and if the demurrer to the special plea should be overruled, then it will be competent to the defendant to move to apply the verdict to that count to which the special plea relates, and to which the assault and imprisonment were clearly applicable. There is no error in taking the verdict as it was; it is the usual course; and the defendant is in no danger of being prejudiced by it. The case cited from Ld. Ray. 820, is not applicable to the objection taken here, respecting the alleged error in making up the record; what is here objected to, is a manifest error of the clerk in leaving in a part which ought to have been taken out, and one which we will amend.

Rule discharged.

KELLOGG ET AL. v. HYATT.

Where in an action on a promissory note, the defendant proved that the note was given by him to the plaintiff, on a sale of some hams, warranted good by the plaintiff; that a large sum of money was paid at the time, and the note given for the balance; that the hams were many of them worm-eaten, and utterly useless, and that the money paid was equal to the value of all the hams, and the jury found a verdict for the defendant, on the ground that the hams were not worth more than the money paid, on a direction by the presiding judge that such finding would be a defence. The court held, that the partial failure was no defence to the action on the note, without evidence of fraud, and a new trial was granted without costs.

Assumpsit upon a promissory note made by defendant. Defence, want of consideration. It was proved that the plaintiffs sold to the defendant 14,000 lbs. of hams, at Detroit, at ten cents per lb.; that defendant paid 600 dollars on account, and gave this promissory note for the residue: the hams were cured, and sold sewed up in bags. The defendant proved, that on the sale the plaintiffs declared that the hams were good; that some of them had had worms in them, but that the parts so affected had been taken out, and that those now sold would keep good for a year. He proved also, that the day after he bought them, he sold one half of them to a third party, and, on proceeding to deliver them, discovered that the

(a) See 3 Stark. Ev. 1447.

lot in general was in an unsound state, most of the hams being wholly unfit for use. He complained of this to the plaintiff's clerk, but did not return nor tender back the hams. The defendant received for the part sold by him 400 dollars, and his claim to the remainder stands unsettled till the determination of this action. The lot thus sold to the third party, one Green, turned out to be very worthless, but he disposed of them all: some for a fair price, others for a trifling price, part was thrown away, part made into soap, and part attempted to be thrown back upon his hands. What the defendant had realised for the whole was not shewn at the trial, but on the facts above the recovery on the note was resisted. The Chief Justice told the jury, that as it was clear that the hams were worth something, if the note had been given for the whole price agreed on, this defence could not be urged, as a total failure of consideration was not shewn, and a partial failure could only be the subject of a cross action. But as 600 dollars had been paid, if the hams were worth no more, then the note might be treated as if given without consideration. The jury considered, that the plaintiffs had been paid the full value of the hams, and found a verdict for the defendant, with leave to the plaintiffs to move to enter a verdict for the amount of the note, if the court should think the defence inadmissible. Fraud was not found by the jury, nor was it submitted to them.

ROBINSON, C. J.—Poulton *v.* Lattimore, 9 B. & C. 265, is a case exceedingly like the present, and a strong authority in support of the verdict; in fact, it differs from it only in two respects: that case was not left to the jury with so distinct a direction to find for the plaintiff if the goods were worth anything, but the court said, on the whole evidence, they were convinced that the jury would have found that they were worth nothing, if it had been left to them; here the jury expressly found that the hams were worth nothing beyond the 600 dollars which had been paid. That case was like this, a case of a sale of some grass seed, warranted to be good. The purchaser had sown some and sold some, and the persons to whom he had sold finding it bad, gave evidence on the trial, as the buyer of the hams from the defendant did here. No offer had been made to return the seed, and no action on the warranty, and the court held that it was good matter of defence to an action for the stipulated price; the only point of difference besides that noted is, that in this case a note was given; there the action was for the contract price, but that makes no difference, in my opinion, so long as the action is between the original parties, and the failure of consideration is entire. The only difficulty in the case, as it struck me at the trial, was, whether, upon the facts, we could properly regard the failure of consideration as extending to the whole note, upon the ground that the balance yet unpaid on the hams, was, to the full extent, a sum beyond their value after the 600 dollars had been already paid. When I came afterwards to look into the decisions connected with the law on this point, several other doubts presented themselves, but, upon further examination the verdict, at last, seems to me to be questionable upon that ground only. In the multitude of decisions respecting sales of goods, it is not to be expected that we can find a perfect consistency: upon some points respecting the right of vendors, under such circumstances, the law is fluctuating; but at present the following points seem to me to be settled:

1st, that in a case like this, even if no express warranty be given, the seller is understood to warrant that the article is of a marketable quality (*a*) ; 2nd, that what was said here, namely, that the hams were good, and would keep for a year, amounted clearly to an express warranty (*b*) ; 3rd, that after such a warranty, although the purchaser cannot bring an action to recover back the purchase money, unless he has returned or tendered the article, nor always even when he has done so ; yet, notwithstanding he has kept and used, or sold the goods, he can sue upon the warranty for damages, when they are of bad quality (*c*) ; 4th, that whenever he is in a condition to sue on the warranty, he can equally resist an action brought to recover the price, and may reduce the damages or wholly prevent a recovery, if the jury shall be satisfied that the goods were really worth nothing, or nothing beyond what may have been already paid for them (*d*). There remains then only the difficulty of a note having been given in this case, and upon that point I think it clear, that if the failure can be regarded as an entire failure of consideration—that is, if the goods were so bad, that nothing can be claimed as justly due on the note, then the action on the note, being brought as it has been, not by a third party, but by the vendor as payee, can be as well resisted as an action for the price of the goods (*e*). If this defendant had paid nothing for these hams, but given his note for the whole price, then, upon the evidence given here, the cases which have been decided would not permit him to resist, because there would be something justly due on the note, and it has been ruled that though a contract may be divisible, yet the security is not ; 2 Burr. 1082 ; though, I confess, I think that doctrine, which is reasonable as applied to illegal considerations, which was the case there, is not so reasonable when applied to considerations failing on other grounds ; yet submitting to the authorities where we find them agree, the question is, whether here the consideration of this note can be properly looked upon as entire, quoad this note ; or whether, keeping in our view the whole transaction, and regarding it as one sale, we are bound to say that the note was given for part payment of the whole lot ; and thus was a stipulation to pay for some that were sound, and some that were unsound. That seems to be perplexing justice with a very needless difficulty. If no note had been given, and the plaintiffs had brought their action for goods sold, to recover the remaining price, then it is clear that the jury, viewing the transaction as they have done, could properly have found for the defendant, because the plaintiffs had given, in their opinion, no consideration for the money they claimed ; but the note here plainly represents that balance ; and the only effect of a note being given, while it remains in the vendor's hands, would be, that it so far ascertains the stipulated price, that the defendant cannot treat the value as an open question, and is not at liberty to go into the question of value, unless when he can shew, as here, that in breach of his warranty the plaintiff sold him articles which were worthless ; and it has been remarked that there is no hardship in such a defence being allowed, as the plaintiff ought to be prepared to prove a compliance with

(*a*) 4 B. & C. 115 ; 4 Taunt. 850 ; 4 Camp. 169.

(*b*) 6 Taunt. 446.

(*c*) Ib.

(*d*) 1 Camp. 190 ; 7 E. R. 482 ; 2 Taunt. 4 ; 1 H. B. 17.

(*e*) 2 Camp. 346 ; Peake 61, 216 ; 3 Camp. 38 ; 1 Esp. 261 ; 3 Smith, 481.

his warranty, which is part of the consideration for the specific price agreed by the defendant to be paid. I think the reason of the case, and the weight of authority, sustain this defence (*a*); though there are certainly authorities against it, and one very recent one, where the point however does not seem to have been much discussed. (*b*) I consider this an entire failure of consideration as to this note; though if it were but a partial failure, there are cases which would support the defence under these circumstances. The plaintiffs here, it was clear, knew of the defence intended to be set up; and though a price was stipulated on the faith of their warranty, the resistance to their claim was no surprise upon them. There being no reason shewn to us, for supposing that the jury did not come to a right conclusion in regard to the value of the hams, I think the rule should be discharged.

MACAULAY, J.—The distinction which, in my opinion, ought to govern this case, arises out of the difference between the defences open to the vendee of goods when sued on the original contract, or on the security, as noticed by Mr. Justice Denison: (*c*) “There is a distinction between the *contract* and the *security*; if part of the *contract* arises upon a good consideration, and part on a bad one, it is divisible; but it is otherwise as to the *security*; that being entire, is bad for the whole, subject to these exceptions, that where there is in the outset an absolute and definite want of consideration, though partial only, it may be shewn as a bar pro tanto to an action on the bill between the same parties, as if it were partly for the plaintiff's accommodation.” But a partial failure of consideration will constitute no defence, if the quantum to be deducted is matter, not of definite computation, but of unliquidated damages; but the defendant may shew fraud, to avoid the contract altogether. Then as to the contract, if bona fide without fraud or warranty, &c., the full price agreed upon may be recovered; if fraud, the defendant may resist on that ground; but if no fraud, and there be a warranty either express or implied, the latter enables the vendor in an action for the price, to give the breach of warranty in mitigation of damages. (*d*) The cases already cited by the Chief Justice shew that, but none of them were actions on the security, and they are to be distinguished from cases in which a vendee having already paid, seeks to rescind the contract, or recover back the purchase money, involving considerations of his right to rescind, and of his duty promptly to return the goods; and though he do not return them, he may resist an action for the price founded on the original contract, when there is a warranty or failure. The cases in the margin, (*e*) give rise to another distinction governing this case. This is not a note for the whole purchase, but for a part of the purchase; for the balance due on the original contract, the sale being attended with assurance of soundness amounting to a warranty; rendering it clear, that if the action was for the balance, or as a quantum valebat, or on a verbal contract of sale at a stipulated price, under a warranty of soundness, the bad quality of the hams might be proved in reduction of damages, or even in bar of the action for this balance. It is argued on the cases of warranty already mentioned, that

(*a*) 1 Camp. 100. (*b*) 8 Dowl. P. C. 174. (*c*) 2 Burr. 1082.

(*d*) Peake, 61; 2 Stark. 166; 1 Esp. 261; 1 Stark. 51; 1 Camp. 40; 2 Taunt. 2; 1 Stark. 52; 1 Stark. 384.

(*e*) 2 Taunt. 2; 3 Stark. 175; 1 M. & M. 483; 1 L. & W. 180.

as the jury found that an amount had been paid on the original agreement, equal to the value of the hams, though more was agreed to be paid; that the note was without consideration, the warranty being proved to be false: and that the case is distinguishable from those where the partial failure of the amount covered by the bill or note was alone proved. On the other hand it is argued, that though *fraud* will open such a line of defence, a mere warranty, in the absence of fraud, will not do so. Of fraud, it may be observed, that if a security is partially tainted with fraud to an indefinite extent, it will often fail in *toto*; fraud vitiating every thing, and thus destroying the instrument; so that partial failure of consideration on the score of fraud, may prevent the right of recovery on the security at all; forcing the vendor to sue for the price, on a general *assumpsit*, or on a *quantum valebat*, for what he was entitled. Of warranty, it is clear that it will not admit of proof of partial failure of consideration, as against the security. The consideration for the note was, all the hams; and in pleading, any other consideration being stated would be a variance; the certain consideration for the promise must, when necessary, be alleged, though no more of the promise than is essential to the redress sought need be alleged.(a) It follows, therefore, that the entire consideration for the note must be gone into;(b) and an unascertained diminution of value be investigated, to determine whether the note be receivable or not; that is, whether there be a total failure of consideration. If the note be one thousand pounds, and the consideration fail as to all but one shilling, the plaintiff would recover the whole, owing to its indivisibility; but if it fall one penny short, he would recover the whole. Now I do not understand this to be the principle to be extracted from the cases. It appears to me the security, whether for the whole or only a part of the price, the consideration for which was an undivided portion of the whole, and not a specific part of the goods, can only be resisted on the ground of fraud in the vendor, not merely of warranty. The fraud avoids the special contract, and opens the case, and it is resolved into a mere question of *quantum valebat*; and if it appear that the full value has been already paid, the security is unsupported by any consideration, and fails. If, notwithstanding the fraud, there be some value for the note, the plaintiff would recover, unless the defendant rescinded the contract *in toto* by returning the goods; for then it would resemble a case of sale without fraud, but accompanied with warranty; and there being some consideration for the note, undefined in amount, the plaintiff would be entitled to recover. It could not be said to be partially tainted with fraud, for the vendee's election to keep the goods, indicates his intention to treat it as a subsisting sale, open only to discussion as to amount; and he would be unable to shew a total failure of consideration. A mere warranty is consistent with, and upholds, the original agreement; fraud vitiates the special contract, and converts it into a general contract of sale; when, if there appear any consideration for the note, it comes within the principle of the cases in the margin;(c) if no consideration appears, the security fails; but when it rests solely on a warranty, it appears to me, that inasmuch as a good and *bonâ fide* consideration originally subsisted for the

(a) 8 East. 7.

(b) 6 East. 569-70.

(c) 1 L. & W. 180; 8 Dowl. P. C. 174; 1 M. & M. 483.

Fraud

note, the collateral warranty does not entitle the vendee to invalidate it ; it is converting an absolute promise in writing, founded on good consideration, into a qualified one, in variance of its terms. There is much force in the view of the Chief Justice, and most likely mine is incorrect. I find no case expressly in point, and though the line of distinction be a fair one, I think it is well defined, and it is this : Fraud entitles the vendee to invalidate the note if he can shew a total failure of consideration, by reason of previous payments to the full value of the goods ; a mere warranty does not. The one repudiates the original contract of sale, the other adheres to it ; the one leads to the conclusion that ab initio there was no consideration for the note, the other admits a consideration originally, but inconsistently seeks to shew its failure, according to the terms of the original sale, and consistently with the bona fides and continuance of the same. After all, however, I confess that I am yielding rather to what I regard as authority, than to conviction ; and I have, in conforming to such authority, endeavoured to state some of the grounds on which I conceive it to rest. I think that there should be a new trial, costs to abide the event ; that the question of fraud may be left to the jury, and the facts attending the transaction be more fully ascertained.

JONES, J.—The hams were sold to the defendant with a representation of quality amounting to a warranty. The defendant afterwards discovered, that they were injured, unsound, and many of them worthless, having sold a large portion of them. Upon the discovery of their unsoundness, the defendant could have repudiated the contract, by giving notice forthwith to the plaintiffs, and returning them as soon as conveniently could be done, placing the vendor in the situation he was in at the time of the contract, without diminution in the value (*a*) ; the contract would thus have been rescinded by the defendant, when the money had not been paid by him ; and it appears to me, that the effect of giving a promissory note for a part of the purchase money, must be the same as paying the whole amount. 1 C. & P. 15, shews, that when a contract for the delivery of goods is imperfectly performed, it must be promptly repudiated by the return of the imperfect articles, but a non compliance with a warranty may be shewn in mitigation of damages, because the plaintiff should be prepared to support his case, by proving the quality of the article such as he warranted it by his contract, but this would not be required on an action on a promissory note, and when the plaintiff has no notice that the defendant intends to impeach the consideration. The defendant has a right to retain an article long enough to ascertain its quality, and if it be bulky, the vendor, upon notice, must himself take it away (*b*). Here the defendant, having sold some of the hams, could not return them, nor could the plaintiff take them, and so the contract be rescinded ; nor, in my opinion, could he give the unsoundness in evidence as a defence to the note, because, as in the case of *indebitatus assumpsit* for goods sold and delivered, where there has been a warranty, the plaintiff could not be expected to support the consideration of his note without notice, by proving his compliance with the warranty. The defendant's remedy is by action on the warranty, which may be maintained at any time without proof of notice to the plaintiff, or offer to

return the hams (*a*). It is not in the power of a defendant to put an end to a contract, except he is at liberty to do so by the terms of the contract itself, unless by consent of the plaintiff, or unless fraud is proved, which vitiates all agreements. If the plaintiffs represented the hams as sound, knowing that they were not, then the defence would be available, as in 2 Taunt. 2, but here there was no evidence of the plaintiff's having such knowledge, at least it was not left to the jury, and they have not found fraud. But the case of *Priquet v. Larne*, 8 Dowl. P. C. 174, is expressly in point. There the defence appeared on the record; the defendant pleaded a part payment, and the note for which the action was brought was given for the residue, and that the work done was of less value than the money paid, and the plea was held bad after verdict, as not shewing a total failure of consideration. Upon the whole, I am of opinion, that unless the defendant could shew fraud on the part of the plaintiffs, he has no defence in this action: if he thinks that he can establish it on another trial, a new trial should be granted upon payment of cost by the defendant, otherwise the verdict must be entered for the plaintiffs for the amount, on the leave reserved at the trial.

Rule absolute for new trial, costs to abide the event.

STUART, Q. T. v. BULLEN.

Where a plaintiff elects to be nonsuited, rather than go to the jury on the charge of the judge, he cannot afterwards move to set the nonsuit aside.

In this case a nonsuit was moved for at the trial, and leave reserved to move in term, on several points; and afterwards, while the judge was charging the jury adversely to the plaintiff, he elected to be nonsuited; and has now moved to set the nonsuit aside.

ROBINSON, C. J.—We think that the plaintiff, having elected to be nonsuited, is bound by his election. The judge could not at the trial have nonsuited him, without his consent, and was proceeding to state his views of the law and evidence to the jury; when the plaintiff, believing that on such a charge he would stand little chance of a verdict in his favor, interposed, and asked to be nonsuited. If, upon the judge urging a nonsuit, he had merely assented, or forborne to oppose the desire or opinion of the court, it would have been otherwise; but here he chose to be nonsuited rather than go to the jury upon the charge which the judge was giving, and probably thinking at the moment that he could make out a better case at a future time. The cases in 3 Taunt. 229, 2 Bing. N. C. 470, 6 Taunt. 336, are in point. There is no doubt that in a penal action of this kind, the plaintiff may be nonsuited; though the action is in part for the benefit of the king. (*b*).

Rule discharged.

WHITE, EX. v. HUNTER.

Probate of a will, granted by the Prerogative Court of Canterbury, in England, gives no title to an executor to sue for a cause of action accruing in this country, the testator having died here. The executor cannot maintain his action without producing letters testamentary, granted by the proper authority in this province.

This was an action brought by the plaintiff, as executrix of one Thomas White against the defendant, calling him "Manager of the Bank of British North America, at Toronto," but not suing him *as* manager, nor taking any other notice throughout the declaration of his being manager, but charging him on the common counts, for money had and received, &c., in his individual capacity. In one set of counts the defendant was alleged to be indebted to Thomas White, in his lifetime, for money had and received, &c., and the promise was laid to him, and in other counts the promise was to the executrix, though the debt in all was alleged to have accrued to the testator. There was the ordinary profert of letters testamentary. The defendant pleaded the general issue, and ne unques executrix, on which the plaintiff took issue. On the trial it appeared, that the testator came to this country from England, that some time after there was deposited for him in London, with the Bank of British North America there, a sum of money, and a printed letter was sent to him by post, addressed to "The Manager of the Branch of the Bank of British North America, at Toronto," of the following tenor:—

"London, 8th October, 1839.

"Sir,—You are hereby directed to pay or account for to Mr. Thomas White, Blenheim, Oxford County, London District, the sum of three hundred and thirty-nine pounds, three shillings, sterling, together with the current premium of exchange, without further advice. From your obedient servant.

(Signed)

A. B. }
C. D. } Directors."

He died in this province, before this letter was presented; and after his death it came into the hands of some one who fraudulently went with it to the defendant at the Branch Bank at Toronto, personating the testator White, and received the money upon it. The executrix now sues to recover the money, notwithstanding this payment. To prove she was executrix, the plaintiff produced letters testamentary, from the Prerogative Court of Canterbury. It was objected by the defendant, that the declaration alleged the defendant to be indebted to the testator, whereas the debt had accrued to the executrix since his death; that the defendant was not properly sued as manager of the bank, under our statute, 7 Will. IV., ch. 34, but was charged in his individual right, and that an action could not be maintained against him by shewing a deposit made at the bank in London. That on the deposit made in London, no action could be maintained against the manager of the bank here; and that, to prove executorship, a grant of probate in this province should be shewn. A motion was made to amend at the trial, by charging the defendant as manager, &c., but it was refused, and the plaintiff was nonsuited, and she now moves to set it aside, either on the legal points raised, or on payment of costs.

ROBINSON, C. J.—With regard to the amendment, the discretion was with the judge before whom it was moved, and his decision is final, nothing being specially reserved for our consideration. If that amendment would overcome all difficulty in the plaintiff's case, we might perhaps grant a new trial, to enable the plaintiff to amend, but there are various other difficulties in this case. I am of opinion, that the plaintiff shewed no debt due to the testator by this defendant, even in his character as manager, if he had been so declared against; until he was made aware of the request or authority of the directors in London to pay the money to White, he could not be considered as holding any money to his use, and there is no other form in which any demand could be proved against him; there was no privity between White and him, and therefore, on this ground, the nonsuit is right. It is clear that the defendant is not sued otherwise than in his individual capacity; a judgment obtained in this action would not come within the 8th and 9th clauses of 7 Will. IV. ch. 34, and a plea by the defendant, denying that he is manager of the bank, would be demurrable, because he is not sued as manager. The consideration upon this point, however, is, whether (as he has been sued as an individual merely) a right of action has been proved against him. In one sense, certainly, a cause of action has not been proved, for no debt was at any time due from him to the testator, and it is only for a debt so due that the plaintiff declares; and on this other ground, I think, the case fails, that White would have had no right of action against this defendant individually, merely by the directors signing this written authority to pay the money. To make him individually liable, he must either have accepted the order, or have had funds of the bank in his hands sufficient to answer it. Then there is another objection to be considered, and I think it is a fatal one, that the probate granted in England does not constitute proof of executorship here, for the purpose of sustaining an action, especially where, as in this case, the testator died in this province. There must be an administration ad litem. The right of the plaintiff to sue in her representative character is expressly denied by the plea, and is thereupon distinctly in issue. It is the probate which makes the executor, and that, and not the will merely, constitutes the proof of executorship (*a*). If therefore the probate be not such as the court can recognize for the purposes of the action, it is as if there were no probate, and the plaintiff fails in supporting the issue affirmatively. It is clear that the representative character of the plaintiff may be denied, as it is here, by a plea in bar. Then the question remains, Does the probate produced give the plaintiff a right to sue in our courts? I consider it clear on the authorities that it does not. If the testator had died in England it would nevertheless have been necessary to take out probate here, and here the testator was domiciled in this province at the time of his death (*b*). The objection seems to have been taken in some cases by demanding oyer of the administration, and demurring; but if the fact apparent on the probate or administration be such as to negative the representative character, so far as regards the proceedings in our courts, it must be equally conclusive when advanced by the plaintiff in evidence, as it was necessary to do upon this issue. If the probate were such as

(*a*) 6 Mod. 134. (*b*) 2 Atkyns, 63; Ambler, 416; William's Exor. 206.

upon the face of it would constitute the representative character entitled to sue in our courts, but there were some facts which when established would invalidate the probate, then these facts would require to be brought out by plea of the defendant ; but here the question is, whether a plaintiff, suing in our courts, making profert of letters testamentary, supports her executorship, when it is denied by a plea of *ne unques executrix*, by producing only a probate from the archbishop's court. There are not, in my opinion, what we can recognize here as letters testamentary, and any thing but the requisite letters testamentary, no more constitutes an executor than the will alone could do it.

MACAULAY, J.—I do not think that the probate produced entitles the plaintiff to sue for and recover assets in this province, where the testator died ; though it is said, an executor may sue for money had and received to his use as executor. I am not satisfied that the plaintiff is not entitled to recover on the issue joined of *ne unques executrix*, it is an unqualified denial of her being executrix in manner and form stated by her ; and if the letters testamentary produced, be admitted in evidence, they prove her to be executrix, within the diocese of Canterbury ; in which name and form she meant to be understood in her plea. I rather think that the defendant should have craved *oyer* of the letters testamentary, and demurred, on the ground that she shewed no legal title to recover. If the letters produced were receivable, they prove the will ; and the will appoints her executrix. The case in 5 B. & C. 491, is, in principle, much in point ; and if *oyer* had been given and set out, they would be identical ; that is, if the probate be admitted as evidence of itself on being produced. There is much to be said on the other side ; as some cases, not carefully distinguishing, seem to say that the insufficiency of the letters to enable the plaintiff to sue in the court, or for the subject matter, may be proved under this plea. There is a want of consistency in it ; the proper course is, to give inspection of the letters, and if internally bad, if insufficient on the face of them, to demur ; and if voidable, *aliunde*, to plead the special matter ; if *void* in themselves, that may be shewn under the plea of *ne unques executrix*. I however think the nonsuit right. The defendant is not properly sued ; nor was the money ever received to the use of the testator. Whether the action is maintainable here, or should be brought in England, is a question which I am not prepared to decide. It is not an original transaction here. In England it would probably be no defence that the money was in the hands of an agent in Canada, if in the eye of the law remitted here. The adoption of the order to pay the testator, though after his death, may be sufficient evidence of a deposit here to the plaintiff's use as executrix. It is a point that should be well considered before the plaintiff renews legal proceedings ; I am not prepared to express any opinion on it now.(a)

JONES, J.—Several objections are taken by the defendant to the right of the plaintiff to recover, but it is unnecessary to notice any other than that which relates to the probate, which is clearly insufficient. In addition to the authorities cited by the defendant's counsel, it is laid down in 3 Burge's Colonial Law, 1011, as follows : " So the probate of a will in England will not extend to property in the colonies, although, if the

(a) See 1 Gale & Day, 312.

testator were domiciled in England, it is said the judge of the probate in the plantations is bound by the probate granted in England, and ought to grant it to the same person."

Rule discharged.

MAIR v. MCLEAN.

Where in an action on a promissory note, payable to the order of A., it was proved that B. indorsed it, and then brought it to A., who indorsed merely for accommodation, never having received any value for it : The court held that want of consideration could not, on those facts, be inferred as between the maker and B., and that the plaintiff was not obliged to prove the consideration.

Assumpsit on a promissory note made by the defendant, payable to one Fraser, or order, and endorsed by Fraser to one Phillips. It was proved at the trial, by Fraser, that Phillips had brought him the note signed by the defendant, as maker, and asked him (Fraser) to indorse it, which he did, not having any interest in the note, and having received no value for it ; as a mere accommodation granted by him at the request of Phillips. On this evidence, the defendant moved for a nonsuit, because no value was given by Fraser to the maker. The plaintiff recovered, with leave to the defendant to move to enter nonsuit, which he did last term.

ROBINSON, C. J.—The defendant relies on the case of *Heath v. Sanson*, 2 B. & Ad. 291 ; but that does not support his objection. All that is relied upon here, is, that Fraser, the first indorser, gave no value for the note ; but no inference arises from that, that the note was throughout an accommodation note merely, because it was not to Fraser that McLean gave it, although he was made the payee. It seems to have been given by McLean, into the hands of Phillips ; and Fraser was asked to become a party to it, in order as we may suppose, to enable Phillips to raise money upon it ; but we are not entitled, from the proof before us, to draw the conclusion, that Phillips gave no value to McLean for the note, or that it was not made to him in payment of a previous debt. Want of consideration between Phillips and McLean cannot be inferred merely from the want of consideration between McLean and Fraser. Phillips did not in fact take it as the indorsee of Fraser, though he did so in point of form ; he seems to have received it from the maker. If it were shewn to us that McLean put the note out as a mere attempt to procure accommodation, and having received value from no one for it ; then the fact of Phillips having paid no consideration to Fraser, if he took it from him, would have brought the case within the rule in *Heath v. Sanson*.

MACAULAY, J.—I adhere to my view at nisi prius. I still regard it as if the original transaction was between the defendant and Phillips ; and it is not shewn that as between them a good and valuable consideration did not exist.

JONES, J.—It is quite clear, that when a failure of consideration is proved in the original inception of a note, a holder suing upon it, must shew that he is a bona fide holder for a valuable consideration. But here, although the note was drawn by the defendant, payable to Fraser, it appears that Fraser's name was used by Phillips for his benefit ; that he took the note payable to Fraser without his knowledge, and that he, at the request of Phillips, indorsed it, but having no interest in the transaction,

took the precaution of indorsing it without recourse. Fraser's name being used by Phillips as a trustee for him, the latter must be regarded as the payee of the note; and as it is not shewn that no consideration passed from Phillips to the defendant, the onus is not thrown upon the plaintiff to prove that he is a holder for a valuable consideration. It was open on the part of the defendant, to have called Phillips to prove the nature of the transaction between them; but having failed to do so, the presumption is, that a valuable consideration was given to the defendant for the note.(a)

Rule discharged.

STEPHENSON v. M'COMBS.

Where a declaration in ejectment had been served on a wrong party, and the attorney of the lessor of the plaintiff wrote to the attorney of the person who ought to have been served, that if he would waive the irregularity and go to trial, no action for mesne profits should be brought against his client, if the lessor of the plaintiff should be successful, and the defendant's attorney accordingly went to trial, and the lessor of the plaintiff obtained a verdict and judgment: the court stayed proceedings in an action which was afterwards brought by the attorney to recover the mesne profits from the defendant, and ordered that the attorney should pay the costs.

Motion to stay entry of judgment and execution on a verdict for one shilling, in trespass, for mesne profits; the defendant's attorney having, since the trial, discovered a letter from the plaintiff's attorney, undertaking that no such action should be brought, if the defendant accepted a declaration in ejectment, and proceeded to trial at the next assizes; which he did. The defendant's attorney swore that this application was not made sooner because he could not find the letter, and that the plaintiff's attorney had said that he would deny having entered into such an arrangement unless his letter was produced.

ROBINSON, C. J.—I think, on a consideration of the affidavits and Mr. Boulton's letter, that the fair construction to be put on the letter is, that if Mr. McDonald would allow him to avail himself of a process in ejectment, erroneously served upon John M'Combs, as tenant in possession, instead of Samuel M'Combs (the real tenant whom it was intended to serve), and would go to trial, so that the title might be determined; which, without such consent, he could not accomplish in this action, no action for mesne profits should follow; that is, no claim be made for rent or occupation before the recovery; and that Samuel M'Combs would be recognized as tenant for the remainder of the term which he had taken from Hainer, who claimed the land against Stephenson; that is, the remainder of the term after the recovery, whatever that might be. I think that the bringing the action for mesne profits was inconsistent with that agreement, and that the rule should be made absolute.

MACAULAY, J.—The rule should be made absolute. If the verdict were more than nominal, it would be a different thing; but I think it should not be made absolute with costs. The defendant's attorney knew of the agreement before the action was brought, and should have applied earlier; and I do not consider the expressed intention of the plaintiff's attorney to deny it, a sufficient excuse for the omission. If an early

application had failed by reason of such denial in the absence of the letter, which had been mislaid, then it would have been a good ground for awarding costs after its discovery. The absence of the letter did not necessarily prevent the application, and since the defendant's attorney delayed voluntarily, though from becoming motives of delicacy, I think an unconditional stay of proceedings without costs, all that he is entitled to.

JONES, J., concurred.

Rule absolute.

GOODALL v. ELMSLEY.

Held that an heir could not sue on a covenant entered into with the ancestor, to convey land to him, his heirs and assigns, within a certain time, the heir not being mentioned in the covenant, and the breach having taken place in the ancestor's lifetime. Where the plaintiff covenanted that his son should serve the defendant for seven years, in consideration whereof, the defendant covenanted at the expiration of the time to convey two hundred acres of land to the son, his heirs and assigns: Held, that the service for seven years was a condition precedent to the right to the conveyance of the land.

Action of covenant on an agreement under seal, by which one Michael Goodall, the son of the plaintiff, bound himself, and was bound by the plaintiff, to serve the defendant for seven years from the 12th Sept., 1830, as a groom. The plaintiff covenanted in the agreement, which he also executed, that Michael Goodall should serve faithfully during all the term of seven years; in consideration whereof, the defendant covenanted to find the son with clothes, food, &c., and at the expiration of the said time to well and sufficiently grant, release, and convey, in such ways and means in the law as the said Michael Goodall, his heirs or assigns, or his or their counsel, &c., shall reasonably devise and advise or require, to the said Michael Goodall and to his heirs, or to whom he or they shall appoint or direct, all that parcel or tract of land, &c. being the northerly third part of Lots No. 17, 18, and 19, in the third concession of Pickering, containing two hundred acres. The plaintiff avers in his declaration, that Michael Goodall died on the 4th February, 1838, after the time expired, leaving the plaintiff his heir at law, as the nearest lineal ancestor; and without averring that he served during the seven years otherwise than by stating generally that he kept his covenant in all things, &c.; and assigns as a breach, that the defendant never conveyed the land to Michael; and although requested by the plaintiff as his heir, to convey to him, the defendant refused. In a second count the plaintiff avers that Michael was always ready and willing to serve. In a third count the plaintiff states that Michael served till a certain day in the year 1832, and that the defendant then discharged him, and refused to let him serve out the time, and yet did not convey the land to him; and has refused since his death to convey to the plaintiff as his heir. The defendant pleads, non est factum; and secondly, that on the 3rd July, 1832, Michael Goodall, with the plaintiff's consent, elected to put an end to the indenture of apprenticeship, and to leave the defendant's service; and upon these pleas the plaintiff takes issue. It was proved that Michael Goodall left the defendant's service in 1832, upon an agreement made by him and his mother with the defendant; that he was to have fifty acres for the time

he had served, and that the plaintiff concurred in this arrangement. Michael died after coming of age, without having received or demanded a deed; and before his death, he declared his wish that if anything was coming to him from the defendant, his brothers and sisters should get it. It was further proved, that the defendant, after the plaintiff's son's death, proposed to give fifty acres to trustees for his sisters, and the plaintiff went to look at the land, but not liking the tract as described, declined taking it, and brought this action as heir at law. The jury found for the plaintiff 62*l.* 10*s.* damages, on the breaches, declaring that they gave that sum as the value of the fifty acres of land. The defendant having moved against the verdict as contrary to law, the court now gave judgment.

ROBINSON, C. J.—There are three points to be considered. First, Has the plaintiff a right of action as heir, under the circumstances which he alleges? Second, Can he recover on this agreement, without shewing a service for the full term of seven years? Third, Did not the defendant prove his special plea, that Michael left his service, and put an end to the apprenticeship, and gave the defendant notice that he had done so? Upon the first point: The covenant to convey the two hundred acres of land which is sued upon, and on which alone this action could be maintained, (for the subsequent verbal agreement given in evidence respecting the fifty acres could not support this action,) this covenant, I say, is with Michael Goodall alone, his heir not being named; the question then is, can a covenant entered into with A. B., not naming his heirs, to convey land to him, his heirs and assigns, by such conveyance as he, his heirs or assigns shall appoint, can that covenant, broken in the lifetime of A. B., be afterwards sued upon by his heir. I am of opinion that it cannot; and that in this case no action lies by the heir. This is not a covenant with the owner of the fee, in which the covenant would be said to run with the land; neither is it a covenant in which the heir is named. It is a covenant to make a title seven years afterwards, upon a certain consideration, and is strictly therefore a personal covenant, in which the heir is not named; all that can be said is, that it regards certain land of which this plaintiff is not, and never was heir; because Michael Goodall was never seized nor supposed to be seised of it. In *Kingdom v. Nottle*, 1 M. & Sel. 355, where the question was whether the executor could sue upon a covenant for title in a deed of release, and *Lucy v. Levington*, 2 Lev. 26, was cited as an authority that he might, Bayley, J., observes of that case, that "if the executor could not have sued, no other person could; because the testator having been evicted, there could be no heir of the land; and that was given as a reason why the action was maintainable." Now certainly this plaintiff never was heir to this land, and upon the same principle can maintain no action, grounded as it could only be on privity of estate.(a) This is a collateral covenant, not a covenant touching an estate conveyed. The language of the instrument indeed does not in terms express a covenant with any one in particular. The father and son are both parties, as well as the defendant; the son places and binds himself apprentice to the defendant, for the term of seven years from a day that was then past, and the father covenants that he shall serve faithfully

(a) Dyer 327-8.

during the term; in consideration whereof, the defendant covenants as already stated, not saying with whom. The defendant's covenant, I take it, constitutes a covenant with Michael Goodall, for whose benefit the stipulation is, and not with his father; and a covenant, which since his death, can be sued on by his personal representatives only, being a collateral covenant to do a certain thing, and not a covenant running with the land.(a) Further, if the heir could sue, (though it is not necessary to decide the point,) I am of opinion that he could not recover in this case, without shewing that Michael served the seven years. It was not till the expiration of the term that the two hundred acres of land were to be conveyed; and the fair construction of such an instrument is, that the land was only to be given in case of the service being rendered, and after it had been rendered; in other words, that the service is a condition precedent.(b) If Michael Goodall, immediately after the execution of the instrument, or on the next day, had left the country, and never performed afterwards a day's service for the defendant, he could not claim the two hundred acres of land; and if not, then his fulfilling the full term of service, is a condition upon which his right depends; for there is no legal principle on which a line could be drawn, so as to entitle him upon any period of service short of a fulfilment of the contract. It was also necessary, I think, in order to shew the covenant broken, to prove that a deed had been tendered to the defendant, to execute; or at least that he should have received notice of the kind of deed required for conveying the two hundred acres mentioned in the agreement; but no such proof was given. The language of the agreement makes this necessary. If the declaration had averred the tender of a deed, as was done in the case in Dyer, 337-8, on a similar covenant, then on non est factum pleaded, the averment would be taken to be admitted; but there can be no implied admission of what is not alleged, and without proving it, there could be no right to recover, because the deed by the words of the agreement was to be according to such form as the other party should devise or require. Then since the plaintiff chose to take issue upon the defendant's special plea, without excepting to its sufficiency, (as he might have done, for it does not answer all that it professes to answer,) we cannot deny that upon the evidence, the verdict ought to have been on that issue in the defendant's favour; for the proof was certainly distinct and clear, that after a short period of service, the son, with the assent of the plaintiff, agreed with the defendant to put an end to the apprenticeship and to the agreement as respected the two hundred acres, and the jury have found that this was the case, for they have expressly given damages, not for the breach of the covenant sued on, but for not conveying fifty acres (instead of two hundred), according to the subsequent arrangement entered into by the parties. Certainly that latter arrangement ought to be equitably carried into effect; but that consideration does not enable us to say, that the action, as it has been brought, can be sustained.(c)

MACAULAY, J.—The second issue was proved in the defendant's favour, and he was entitled to a verdict; if such issue was immaterial, and the

(a) *Shep. Touch.* 175; 2 *Lev.* 26.

(b) 1 *Saund.* 280, n. 1; 1 *T. R.* 645, 638; 6 *T. R.* 668, 671; 7 *T. R.* 130.

(c) 1 *T. R.* 141.

plaintiff entitled to judgment non obstante, it should be moved, and argued on that point. I very much incline to think a seven years service a condition precedent to the right of the plaintiff's son to the land; and the plaintiff's right of action as heir at law, (admitting the son's right,) is by no means clear; the covenant is with the son, not with him and his heirs, but to convey to him and his heirs, and the breach, if any, was in the son's life time, unless notice of the ways and means in the law by which he was to convey, was a previous requisite to such right of action; and if so, it is not in this declaration alleged to have been observed, either by the son in his lifetime, or the heir or counsel of the heir, since his death.

Rule absolute.

SANDERSON v. HAMILTON.

In an action by a defendant in a writ of execution, against the sureties of a sheriff on their covenant, under the statute, for misconduct in the sheriff in the execution of the writ, it is not necessary that he should set forth in the declaration the judgment in the suit against himself: and it is a good breach of the covenant to shew that the sheriff sold the defendant's property for more than sufficient to satisfy the debt, and afterwards wrongfully resold it at a reduced price, causing a loss to the defendant of the difference.

The plaintiff declares in covenant against the defendant as a sheriff's surety, and assigns three breaches:—The first breach sets out a writ of ven. ex., by Detrick and Stephenson, against the plaintiff, in which is recited that a fi. fa. against the plaintiff's lands had issued in that suit, for 203*l.* 2*s.* 8*d.*; that the sheriff had returned lands seized to the value, and unsold for want of buyers; that under the ven. ex., which was indorsed to levy 178*l.* 10*s.* 8*d.*, the sheriff exposed the plaintiff's lands for sale, and though he well knew that a part only would have fully satisfied, he wrongfully sold the whole tract, and levied thereout 450*l.*, and sold them for much less, viz. 250*l.* less than they were worth, and than he could have sold them for, and disposed of the monies arising from the sale to his own use. Second breach, that the sheriff sold the plaintiff's lands, under the ven. ex., for 450*l.*, and would not pay over to the plaintiff the surplus or any part thereof, but converted it to his own use, and wrongfully exposed the same lands again for sale; and did, under colour of the said writ, sell them again for 200*l.*, and afterwards falsely returned to the writ of ven. ex. that he made the sum indorsed, which he had ready. Third breach, that the sheriff sold the plaintiff's lands, on the ven. ex., for 450*l.*, and fraudulently and collusively abandoned the sale, and permitted the purchaser to abandon the same; and under colour of the same writ, sold the lands again for 200*l.*, being 250*l.* less than he could have got for them, and than they were reasonably worth. The defendant demurs specially to the first breach, assigning for causes, that it is not shewn that there was any judgment against the plaintiff, or any fi. fa., which could warrant the writ of ven. ex. declared on, or that any lands were taken in execution by the sheriff, and files a general demurrer to the second and third breaches.

ROBINSON, C. J.—With respect to the special demurrer to the first breach, I am of opinion that the causes of demurrer are not tenable. The cases cited from 2 T. R. 148, and 9 East. 298, shew that where the

defendant in the original action complains of the sheriff for an oppressive abuse of his authority in acting under a writ of execution, he is not under any necessity of shewing that the execution under which the sheriff acted, was supported by a judgment. It is different where the plaintiff in the first suit complains of misconduct in the sheriff, by which he has been deprived wholly or in part of the fruits of his judgment: then he must aver and shew a judgment, because it is the foundation of his claim, and if there was really no judgment to support his execution, he can have sustained no injury, and can have no just right to sue. But this plaintiff would not be less injured by such misconduct as he complains of, if there had been really no judgment to warrant the execution. The distinction is taken in *Ackworth v. Kemp*, Doug. 40, where Chief Baron Eyre held in the case before him, the party could not sustain the defence he was urging, because he had not proved a judgment on which a writ of *fi. fa.* had issued, being of opinion, as he said, "that the writ itself was not sufficient evidence, unless where the action is brought by the person against whom the writ of *fieri facias* had issued." With respect to the general demurrs which have been filed, I do not see that we can hold the declaration to be bad upon general demurrer, or in other words, how we can say that independently of formal objections, and even according to the very justice and right of the case, it states no ground of action. The first and third breaches are clearly good, and the second seems also to be sufficient as it regards the not paying over the surplus.

MACAULAY, J.—I do not think, that, for the purposes of this action, it was incumbent on the plaintiff to set out the judgment, or the writ of *fi. fa.* The recital in the *ven. ex.* imports a *fi. fa.* returned by the sheriff of which therefore he was cognisant. The writ justifies the sheriff in selling, and the plaintiff does not question its regularity. I think the first breach sufficient to sustain the action; it is in fact one continued statement of a series of wrongs, arising out of the same transaction, and following in succession; as, first, selling all the lands, when a part would have sufficed; second, realizing a much greater sum than sufficient; third, selling the lands at much less than their value, and converting the proceeds to his own use (*a*). Besides, mere redundancy will not invalidate a breach if otherwise well assigned. The second breach alleges that the sheriff realized more than sufficient to satisfy the execution, yet did not, though requested, pay over the surplus to the plaintiff, but converted it to his own use, and afterwards resold the same lands at a less sum. I do not see how his return of having made the sum indorsed on the *ven. ex.* was *false*, as alleged, for the plaintiff asserts that he did make it, and more. But refusing to pay over the surplus, on request, was a breach of duty and of the covenant, as was the reselling at the reduced price, if the plaintiff was to be at the loss of the difference. The breach in effect is, that he first sold for 450*l.*, refused to pay the plaintiff the surplus, but resold for 200*l.* The third breach is stronger than the second. It alleges a sale for 450*l.*, followed by a fraudulent and collusive resale, in order to deprive the plaintiff of the difference or surplus. I do not see that the plaintiff's case is weakened by alleging the first sale to be lawful; it supports it, because if not a lawful sale, it might inevitably

prove abortive, and render another essential; but if lawful, then the necessity for a resale does not appear, and improper motives, as well as acts, are attributed to the sheriff. The effect of a resale (the first sales being abandoned) was to reduce the surplus to which the plaintiff was entitled. A contract of sale at 450*l.*, might, while inchoate, be abandoned by the sheriff, so as to enable him, in point of legal authority, to sell again under the writ, and give a valid title to his vendee, and it is on this account that the plaintiff complains. He is without other redress, and it is for the sheriff to explain, by way of defence, any circumstances that may have justified the course alleged to have been taken, if the fact of the second sale be admitted. On this demurrer, I think the action lies on each breach.

Judgment for plaintiff.

REEVES *v.* MYERS.

Where in trespass quare clausum fregit, the defendant attempted to justify under a writ of possession, and put in a judgment against the casual ejector for lands in the same township generally, not describing them, and a scire facias to revive that judgment, on which the plaintiff had been summoned as terre tenant, and a judgment on the scire facias, each as general in the description of the lands as the judgment against the casual ejector, the plaintiff not having been in possession when judgment was entered against the casual ejector: The court held that the justification was not complete, without shewing that the plaintiff had been connected with the proceedings in ejectment.

Trespass quare clausum fregit, in which the plaintiff recovered 200*l.* damages, subject to the opinion of the court on the following case:—The plaintiff, in February, 1838, was in possession of five acres of land, in the township of Sidney, when the defendant entered with the deputy sheriff, and took possession, under a writ of habere facias possessionem. This was the trespass complained of; and the defendant, in order to justify his entry under the writ, put in a judgment in favour of himself and another person against the casual ejector, for certain lands in Sydney, not specified in the declaration, otherwise than as so many acres of arable land, &c. To revive this judgment after a year, a scire facias was sued out against the casual ejector, and Reeves and three others, as terre tenants, the scire facias not specifying the lands, but describing them generally as in the judgment. This plaintiff was summoned on the scire facias, but did not appear, and judgment was entered by default, and the writ issued under which the defendant took possession, the plaintiff not having been in possession at the time the judgment in ejectment was entered. It did not appear that the ejectment had any reference to these premises; the judgment was general, the writ followed the judgment, and it was not shewn that the present plaintiff had been served with the declaration in ejectment, nor whether it had been served on these premises, nor for what lands, nor how the defendant was entitled, and the plaintiff therefore contended that no justification was shewn, and that the defendant was not entitled to judgment in law, however he might claim relief from the court for excessive damages.

ROBINSON, C. J.—We cannot hold that the defendant is entitled to a new trial, on the ground that the verdict should have been in his favour; for we think it was rightly objected at the trial, that he did not shew that

connexion of this plaintiff with the proceedings in the ejectment, which was necessary to make the judgment and writ of habere, and the possession taken under it, available as a defence ; but as the damages given by the jury were most excessive, we make the rule absolute on that ground. But we think that he failed in establishing a legal defence. The defendant did not shew that his recovery in ejectment had any connexion either with these premises, or with this plaintiff. He did not shew in any manner for what lands that ejectment was brought ; there being judgment of default, there was no trial, and of course no evidence of title applying to this land, or to any other ; the judgment is a recovery of nothing specific, the execution necessarily followed the judgment and is equally general, and the scire facias brought to revive the judgment was in the same form. Nothing therefore appeared on the trial of this cause to connect the proceeding in ejectment with the premises in question in this action, more than with any other land in the same township. It did not appear on whom the declaration in ejectment had been served, and therefore no privity could be shewn, or was shewn, between this plaintiff and the person served in the ejectment as tenant in possession.(a) The scire facias being brought against this plaintiff as terre tenant, he was served with the writ ; but no privity being shewn between him and the tenant in possession, against whom the ejectment was brought, upon what principle can it be said that he was bound by the recovery ? Neither should the judgment on the scire facias include him as to this land, for no connexion is shewn between the one and the other ; and it was besides not competent to him to dispute the ground of the judgment. Suppose that the year had not elapsed, and that Reeves being a stranger and in possession, Myers had taken out his writ of habere on the judgment, and dispossessed him under it, and Reeves had brought his action of trespass in consequence ; Myers could clearly have made out no justification under the writ and judgment, without shewing to the jury that the locus in quo was the land that had been recovered in the ejectment ; then why must not the jury in this case have it proved to them by evidence, that the premises in question were the premises recovered ? The having taken out and served a scire facias upon this plaintiff in which nothing specific is stated, cannot vary the case.

MACAULAY, J.—Neither the original judgment, nor the scire facias, containing any specific description to guide the execution, and identify the lands recovered, it ought to have been proved for what particular premises the action was brought, as by shewing on whom the ejectment was served, and for what lands ; or at least that the scire facias was served on the plaintiff on the lands claimed, and that he was apprized thereof ; or if served off the land, that he was informed for what the plaintiff claimed execution.(b) The defence ought to have been specially pleaded, and some distinct issue raised on the record. The case has been treated as if the plaintiff, admitting the recovery on scire facias, denied that the locus in quo was embraced therein ; assuming this to be the issue, it was incumbent on the defendant to prove identity ; which not being done, the defence was inadmissible. It was formerly necessary to

(a) *Cook v. Cook*, 3 Lev. 100.

(b) 1 Wils. 220; Bull. N.P. 110; 7 T.R. 327; 1 B. & P. 573.

prove the possession of the defendant (tenant), on the trial of an ejectment, in order to determine the premises of which he was to be dispossessed ; and it appears to me, that the old cases on that head afford analogies applicable as guides on the present occasion. On the face of the judgments and evidence, it remains a question, what particular lands the defendant actually brought his ejectment for and recovered. I think that there should be a new trial on payment of costs, under all the circumstances, especially owing to the large damages, with leave to the defendant to plead a justification; so that the case may go down again upon a distinct and regular issue on the record, on the subject of the defendant's alleged authority of law to enter into the locus in quo.

Rule absolute for new trial on payment of costs.

STEDMAN v. WASLEY.

Where in trespass for seizing cattle, and causing them to be sold, the defendant pleaded that the cattle were taken damage feasant, and proceeded to justify the sale under 1 Vic. ch. 21, and the plaintiff replied, that the defendant's fences were defective, and that the cattle escaped from the highway into the close. Held, on demurrer to the replication, that it was bad for not stating that the cattle escaped through the defect in the fence, and that the plea was good, as it shewed a sufficient justification of the seizure, the sale being merely matter of aggravation.

Trespass for seizing cattle, and causing them to be sold, &c. The defendant pleads that he took the cattle as a distress damage feasant, and that thereupon the pound-keeper did, according to law, notify three persons, &c. (naming them), to appraise the damage, and also to judge of the sufficiency of the fence enclosing the ground, wherein the cattle were found doing damage, and that they having met together, having appraised the damage, and having viewed the fence enclosing the ground, did, according to law, and within the time prescribed by law for that purpose, reduce their award to writing, and deliver the same to the pound-keeper, subscribed with their names, and by such award the said freeholders awarded and determined that the said fence was a good and lawful fence, and did further appraise the damage done by the cattle, &c., at 2*l.*, and because the said damages were not paid, the cattle were kept and impounded, as in the declaration mentioned, and until the same were sold and disposed of according to law, which are the same trespasses, &c. The plaintiff replies, that at a meeting of the inhabitants, householders of the township of Whitchurch, held on, &c., according to law, it was determined that fences should be five feet and a half high ; and he avers that the fences of the said close, in the said plea mentioned, were not five and a half feet high, and that the said cattle, lawfully being at large on the highway, contiguous to the said close, without the knowledge and against the will of the plaintiff, escaped from the highway into the close (not saying by reason of the defect of the fence), and that the defendant wrongfully seized and impounded them, and detained them, as in the first count mentioned. The defendant demurs specially to this replication, as attempting to put in issue a matter determined by the award. The general issue had also been pleaded, and the case was argued, assuming the only question to be, whether the fence viewers' award could be falsified.

ROBINSON, C. J. — This case, as it was argued, turns upon statute 1 Vic. ch. 21, s. 32, 33, 34, and 35, and it is material also to consider sec. 12. The declaration in the first count expressly charges the defendant with causing the cattle to be sold, whereby they were totally lost to the plaintiff; and the defendant justifies the seizure and detention only, and not the sale; but as the general issue is pleaded to the whole declaration, it is immaterial to consider whether the justification covers the whole alleged injury, as there can be no discontinuance. If, indeed, the special plea professed to answer more than it does in fact answer, that would be a fatal objection; but there is this qualification of that principle of pleading, that the matter which is thus included in the introductory part of the plea, but left unanswered in the body of it, must not be mere matter of aggravation, but must be essential to the action (*a*), the last case in the margin being precisely in point, and in an action of this kind. If it were necessary that we should determine whether this plea sufficiently justifies the detaining after the seizure, and the selling of the cattle, then we should have to take up the case on the ground on which it was argued, and decide whether the award of the fence viewers was so made as to render it conclusive between the parties; that it must be conclusive, if rightly made, as to the sufficiency of the fence, there can be no doubt; but whether the award was a proceeding sustainable under the circumstances would depend upon the provisions of the statute, and the mode of acting under them, which would have to be carefully examined; whereas upon the argument it was assumed that the only question was, whether, notwithstanding an award of fence viewers (supposing it to be regularly made), the fact of the fence being a lawful fence, could not come in issue; in other words, whether, upon that point, the award must not be final and conclusive, or whether the owner of the cattle might not nevertheless shew what the fact really was. But an examination of the pleadings shews that the case does not turn upon this point. The plaintiff complains of the taking his cattle, and of the impounding, detaining and selling them, whereby they became lost to him; the defendant pleads as to the taking and seizing the cattle, and detaining them until they were sold, as in the declaration mentioned, that the cattle were wrongfully in his close, doing damage, whereupon he seized and impounded them, as he lawfully might. Now there can be no doubt that this plea, which is in the usual language of a plea justifying the taking as a distress damage feasant, does sufficiently answer the taking, which is the gist of the action, and the substantial trespass complained of; the plea, therefore is good upon general demurrer, notwithstanding that in proceeding to justify the detention till the sale, and relying upon the award as to the damage, and the sufficiency of the fence, it may be subject to exception, because that applies only to what was done with the cattle after the taking, which is the main trespass complained of, and which is sufficiently justified. The plea, then, being sufficient on general demurrer, it remains only to inquire whether the replication is sufficient? The objection assigned is, that it is bad, because it seeks to rest the case upon the actual sufficiency of the fence, without regarding the award made by the fence viewers; but without going unnecessarily into this point, which might involve questions upon

(*a*) *Taylor v. Cole*, 3 T. R. 296; 1 Saund. 28, a.; 3 Wils. 20.

the plea in regard to the award which is there set out, I am of opinion, that upon other grounds the defendant is entitled to judgment; for the replication is clearly bad. The plaintiff avers in it, that the defendant's fences were defective, but he does not say that the cattle escaped into his close by reason of the defective fences, which it was absolutely necessary for him to state, in order to make the defence material; since it is of no consequence that the enclosure might have been in some one part out of repair, if the cattle did not in fact gain admittance there, but broke in where the fence was good. The taking is justified by the plea as a distress damage feasant, and the justification is not repelled by shewing that the plaintiff's cattle were not in fault. Judgment must therefore be for the defendant. There are other points in which the replication seems defective, but I do not think it necessary to go into them.

MACAULAY, J.—The statutes regulating fences, and the impounding and sale of cattle distrained damage feasant, are 4 Will. IV. ch. 12, and 1 Vic. ch. 21, and the last act provides that the township meetings should determine what cattle, in what manner, and at what seasons, might run at large, or be restrained from so doing within the year. Poundkeepers are to be elected according to section 5. The trespass is alleged on a day *after* the passing of that act, but no elections could take place under it until January, 1839; consequently, the poundkeeper must have been elected under 5 Will. IV. ch. 8, sec. 6; and the plaintiff refers to a township law of 1836, touching the sufficiency of fences. This latter act empowers the township meetings to determine and order, in what manner, at what periods, and what description of cattle, &c., (not expressly provided for by the law,) should be allowed to run at large, or be restrained for the year; and most of its provisions are identical with those of 1 Vic. ch. 21. The plea introduces a series of allegations not sufficiently specific, if necessary to be stated at all; but I do not perceive that they are indispensable averments to sustain the trespasses essential to be justified in the plea, and I think that they may be rejected as surplusage. I allude to the passage “and thereupon,” to “£2.” Rejecting this passage, the plea would seem sufficiently to justify the seizing, taking and impounding the cattle, which is the gist of the action and defence. The detention for eighteen days, and until sold, as alleged in the declaration, is an indefinite time, being laid under a videlicet, though not so expressed in the introductory part of the plea; and being merely aggravation, and not the gist of the case, does not seem to require that the plea should cover it.(a) The defendant justifies the seizing and impounding damage feasant; if by reason of any subsequent conduct he became a trespasser ab initio, it should be specially shewn in the replication. If a detention for eighteen days should under this plea be justified, it does not appear to me to be sufficiently done; but I understand from the authorities that the original seizure and impounding being justified is sufficient, without further justification for the time of detention, even though professed to be justified, not being material, nor the gist of the action. Whether the selling the cattle as laid in the first count, be a substantive trespass not justified, is a question not arising on this demurrer. I consider

(a) 3 Wils. 20; 3 T. R. 297; 1 Saund. 28, (3); 2 Camp. 175; 1 H. Bl. 555; 2 Wils. 213; 10 East. 73; 1 Vent. 54; 3 Bing. N. C. 72.

the replication bad, because it does not shew that the cattle escaped through defect of fences, nor that it was lawful for such cattle to run at large.

Judgment for defendant.

UPPER v. HAMILTON.

In an action against a sheriff for a false return, a plea that no writ of fieri facias issued upon the judgment according to law, is bad on special demurrer ;—and to a declaration for a false return, alleging that the sheriff made the money, but returned that he had made fifteen pounds and no more, it is a bad plea that the sheriff did not seize nor levy any money, as he is concluded by his return as to fifteen pounds; but to an averment that the sheriff made all the money and did not pay it over, such a plea is good. It is also a good plea to a breach that the sheriff made the money on the writ, and did not pay it over, that the sheriff made a certain sum, which he paid over, and it is not necessary to shew to that breach, that the defendant had no goods whereof the residue could be made; although to such a breach it is a bad plea, that the sheriff was instructed to make a certain sum, and that he made that sum and no more, or that the writ was not returned as alleged in the declaration. And to an averment of a false return to a writ against the goods, &c. of two defendants, a plea that *they* had not any goods, is bad on special demurrer: it should deny that *either* of them had any goods.

Covenant against the defendant as a surety of the late sheriff of the Niagara District, in the usual form, and breach assigned that the plaintiff obtained a judgment in the Niagara District Court against John Wentworth and Elon McArthur, for 44*l.* 18*s.* 6*d.*, on 21st September, 1836, and issued fi. fa. thereon against the defendants' goods, which was delivered to the sheriff, who seized goods of the defendants to the value of the damages, and levied the same thereout, but that the sheriff had not the money at the return of the writ, but made default, and afterwards, at the return of the writ, falsely returned that he had made the sum of 15*l.*, and that the defendants had no more goods whereby he could make the residue. The second count is upon a subsequent covenant of the same nature, entered into by the defendant, for the same sheriff, and assigns as the first breach that the plaintiff obtained the same judgment as set out in the first count, and on the 10th December, 1837, sued out fi. fa. against the therein defendants' goods, that the sheriff levied the full amount, but had not the money at the return, or any part thereof, and falsely returned that the defendants had no goods whereby he could make, &c.; and as a second breach, alleges that the sheriff, upon the same fi. fa., levied the full amount of damages, but he had not the damages at the return of the writ, but falsely returned that he had made 15*l.*, which money he has ready, &c., and that he had not found any more goods or chattels of the defendants whereof he could levy, &c. The defendant pleads several special pleas: 2nd, 9th, and 15th are to the first, second, and third breaches respectively, that no fieri facias issued upon the said judgment according to law; to which the plaintiff demurs specially, as being argumentative, and seeking to put in issue matter of law, which is immaterial. 3rd, 10th, and 16th are to the three breaches respectively, that the sheriff did not seize or take in execution any goods of the defendants, or either of them, and did not levy any sum of money thereout; and the plaintiff demurs specially, because they do not state why the

sheriff did not seize and levy, &c., or that the defendants had no goods, and for duplicity, in stating that the sheriff did not take in execution any goods, and that he did not levy, and that they do not state whether the sheriff returned the writ or not. 4th and 17th are to the first and third breaches, that the sheriff did levy of the goods and chattels of the defendant 15*l.*, and no more, which sum he paid over to the plaintiff, and that the *defendants* had not any more goods or chattels whereof he could make, &c. Special demurrer to each plea, because it puts in issue several distinct matters; that the sheriff levied 15*l.* and no more; that he paid that money to the plaintiff; that the defendants had no more goods; and also because it does not state that *neither* of the defendants had any more goods. 5th and 18th, to first and third breaches, shew that the fieri facias was indorsed, with directions to levy 15*l.*, besides sheriff's fees; and that the sheriff did, by virtue of the said writ and indorsement, levy and make of the defendants' goods, the said sum of 15*l.*, and this he is ready to verify, &c.; special demurrer, because it is not stated that the sheriff levied 15*l.* *besides his own fees*, nor why he did not levy the whole, nor that the indorsement did not direct him to levy more than 15*l.* besides sheriff's fees, and because it does not deny that the sheriff levied the full amount of damages stated in the writ. 7th, 13th, and 20th, that the writ of fieri facias was not, and is not, returned to the Niagara District Court, as alleged; special demurrer, that the pleas offer to put in issue a matter of practice. 11th, that the *defendants* had not any goods, &c., from the delivery to the return of the writ, whereby he could have made, &c.; special demurrer, because it is not stated that neither of the defendants had any goods, &c.

ROBINSON, C. J.—Upon the demurrsers to the 2nd, 9th, and 15th pleas, which all involve the same question, the plaintiff is entitled to judgment. The issue tendered by the defendant is, that "no writ of fieri facias was sued out upon the said judgment according to law," which leaves it uncertain whether the defendant means to assert that no writ issued, or that the one which did issue was illegal. It is objectionable on the ground that it amounts to a negative pregnant, and moreover seeks to put in issue before the jury, what may be mere matter of law (*a*). Upon the 3rd and 16th pleas, the plaintiff also must have judgment, because in his declaration he has averred, in the assignment of the breaches to which these pleas are answers, that the sheriff returned upon the writ, that he had levied 15*l.*, which he had ready, &c., and complains that he had not paid it over; and the defendant, not denying that the sheriff did make such a return, pleads in the face of the return that he never did levy to any amount, which clearly he could not properly do (*b*). The sheriff was concluded by his return, which is parcel of the record, and if debt had been brought upon it for the 15*l.* he could not have pleaded *nil debet*. The defendant should either have denied the return, or should have confessed and avoided it. (*c*) Upon the 10th plea, the defendant, I think, is entitled to judgment, because in the second breach the charge is, that the

(*a*) 1 C. & M. 332; 1 Dowl. 661; 16 East. 39; 1 D. & R. 50; 1 Wils. 334; 3 Burr. 1360.

(*b*) 1 M. & W. 728; 4 M. & S. 349; 6 M. & S. 42; Cro. Car. 539; 1 Saund. 39.

(*c*) 2 Saund. 344, (note).

sheriff made the whole debt, and did not pay it over, but falsely returned that he had made nothing. The plea denies that he made anything, which puts in issue the substance of the action. It was not necessary for this defendant to account for the sheriff not levying, or to state anything more than he has done. The plaintiff has himself set out the return of the writ, and does not complain that the sheriff did not levy when he might, but that he did levy and did not pay over. Upon the 4th and 17th pleas, I think the defendant is entitled to judgment. The plaintiff's cause of action, stated in the breaches to which these pleas are answers, is, that the sheriff made the whole amount, but had paid nothing over; or, as the declaration alleges, had not the money in court at the return of the writ. The defendant answers, that the sheriff levied 15*l.* and no more, and that he paid that over to the plaintiff; that is a good answer to the injury complained of. It denies the wrong stated, admits a partial levy, and shews that in respect of what he did levy the sheriff was not in fault. The plaintiff does not complain, in assigning these breaches, that the sheriff did not levy more than he did levy, and it becomes immaterial therefore, as to these causes of action, to inquire whether the defendants in the district court had or had not goods more than were levied upon, for the plaintiff charges here no neglect in not levying, but on the contrary, declares that the sheriff did levy the whole debt, and the breach is that he did not pay it over. The defendant answers, that the sheriff did not pay over all the debt, because he did not levy all; but he did levy a part, and that part he paid. Whether he might have levied more or not, is another question, which on these pleas they were not called upon to answer. If a man make an imperfect mention of a thing, which need not be mentioned, it shall not prejudice, and surplusage in a plea does not vitiate more than in a declaration. Com. Dig. Pleader, E. 12 (*a*). Upon the 5th and 18th pleas, the plaintiff, I think, is entitled to judgment. The defence is, that the sheriff was instructed to levy 15*l.* and sheriff's fees, and did levy the 15*l.* but it is not shewn that he paid it over, nor is the charge answered, that the sheriff levied the whole damages mentioned in the body of the writ; and this defence moreover is repugnant to the sheriff's return, as set forth in the declaration. Upon the 7th, 13th and 20th pleas, I am of opinion that the plaintiff is entitled to judgment. The defence is rested simply upon the fact, that the writ of fieri facias was not returned to the Niagara District court, as mentioned in the declaration, which is no answer to the charge, that the sheriff had levied the full amount, and had not paid it over. Even assuming that according to the dictum in *Moreland v. Leigh*, 1 Stark. N. P. C. 312, no action would lie against a sheriff for money levied on a fieri facias, until it has been returned, yet here the defendant does not deny that the writ has been returned, but only that it has been returned as stated in the declaration, viz., "nulla bona." And this besides is not an action against the sheriff, but an action brought after his death against his sureties, and the substantial question is whether he had in fact received the money. Upon the 11th plea, I think the plaintiff is entitled to judgment. The 2nd breach, to which that is an answer, states that the sheriff made the whole amount which he was directed to levy, but did not pay it over, and

returned that he had made nothing. The plea says in answer to this, that John Wentworth and Elon McArthur had no goods whereby the sheriff could have made the debt. The objection urged against this plea upon the demurrer is, that it does not say *neither* of them had any goods, and I think the objection good on special demurrer as this is, though the plea might be sufficient on general demurrer, on the authority of the case cited of *Jones v. Clayton*, 4 M. & Sel. 349, upon the principle, that for the purpose of answering this execution, the goods of either were the goods of both, and that the allegation that the other had not goods or chattels was severable. But, independently of this question, the plea is insufficient and faulty, for it does not answer the breach as it professes to do. It does not deny that the late sheriff made the money on the writ, otherwise than argumentatively by saying that the defendants had no goods from which he could have made it. This would be a proper answer to an action for a false return, but is not a direct and formal, and therefore on special demurrer, not a proper answer to a charge of having made the money and withheld it.

MACAULAY, J.—The 2nd, 9th, and 15th pleas, that no writ of fieri facias was sued out of the Niagara District Court according to law, are bad.(a) The 3rd and 16th pleas to the first and third breaches, are bad; they deny having made anything, or having seized any goods, or levied any money, (though the plaintiff alleges a return of having made 15*l.*), without confessing and avoiding the return. The alleged return of 15*l.* levied, and the default in the payment thereof are not answered.(b) The pleas assume to answer more than they do answer, and are therefore demurrable. The 10th plea answers the second breach, and is good; as are also the 4th and 17th pleas. The 5th and 18th pleas are bad; they do not answer the allegation of default in having the money at the return of the writ, nor deny having levied the whole amount stated in the body of the writ, as alleged. The 7th, 13th, and 20th pleas are bad; they do not answer the whole breaches assumed to be answered, and do not deny any return of the writ, or describe how it was returned, but merely that it was not returned to the District Court as mentioned, leaving all in uncertainty. The 11th plea is also bad; it is not a full answer to the breach, which is, that the sheriff levied the amount and returned nulla bona. The defendant denies the levying the amount only by implication, merely alleging that the defendants had no goods whereof he could levy, as an answer to the assertion that he did levy. The substance of it is, that he made the money, yet did not pay over, but returned nulla bona. The plea is, that the defendants had no goods; not that he did not make the money and neglect to pay, which is the gist of the breach. If one had goods, the money may have been realized thereout. *Jones v. Clayton*, 4 M. & S. 343; Cro. El. 84; the last case goes to shew that the plea denying that the defendants in the writ had any goods, is a sufficient answer to that part of the breach which is for a false return of nulla bona; it is only asserted that he made the money of their goods, and returned that they had no goods; the plea asserts the return to be true, viz., that they had no goods; and if *either* had, that being proved, would on the trial rebut the plea, as being involved in the issue. The defect in the

(a) 1 Dowl. 661.

(b) 1 Ld. Raym. 184; 6 M. & S. 42.

plea is, that it assumes to answer the whole breach, including the alleged levy of the amount, and default in having it at the day, &c.; which are not denied, unless by implication, on this last ground it is bad. The return of the writ is not objected to, and the plea supports the return in the averment. If a return that the two defendants had no goods was bad, without saying, or either of them, it should have been objected to before. It is adopted as made, and the plea affirms it. If there is any defect, it is in the return to the fieri facias, not in the plea which meets the breach.

Judgment for plaintiff on the 2nd, 3rd, 5th, 7th, 9th, 11th, 13th, 15th, 16th, 18th, and 20th pleas, and for the defendant on the 4th, 10th, and 17th pleas.

CRONK ET AL. v. CRONK.

The respondent to a petition for partition, under 3 Will. IV. ch. 2, may demur to the petition.

The question in this case was, whether the respondent in a petition for partition, under our statute 3 Will. IV. ch. 2, could demur to the petition.

ROBINSON, C. J.—If we regard the petition here, as standing in the place of the declaration in the real action for partition in England, I do not see how the right to demur to it can be doubted (*a*). The tenant, when he appears, is allowed by our statute to plead to the petition; and it is expressly provided, that to his plea the petitioner may reply or demur. As, therefore, an issue of law may be raised upon the plea to the petition, I do not see why the plea itself may not raise an issue in law.

MACAULAY, J.—I see no good reason against a general demurrer. As to technical objections shewn for special cause, their effect will only come under consideration where the demurrer is considered.

Judgment for respondent.

(*a*) Arch. Pleading, Partition; 8 & 9 Will. III., ch. 3, s. 31; 2 Sir W. Bla. 1134; Com. Dig. Plead. 3 F. 1.

QUEEN'S BENCH.

EASTER TERM, 8 VICTORIA.

MONDAY, 3RD FEBRUARY, 1845.

Present,—THE CHIEF JUSTICE,
 MR. JUSTICE JONES,
 MR. JUSTICE HAGERMAN.

MR. JUSTICE MCLEAN having presided in the Practice Court last term, gave no judgments in any of the cases decided this day, as they had all stood over for judgment from last term.

Mr. Justice Macaulay absent in England.

GREIG ET UX. v. BAIRD.

Where in an action by husband and wife, on a contract made with the wife before marriage, the defendant pleaded the Statute of Limitations, to which the plaintiffs replied absence beyond the seas, and that they had never come into this province, upon which the defendant took issue, and upon the trial it was proved that the wife had never been in this province, and it appeared that she had been married in Scotland: the court refused to allow a nonsuit to be entered on leave reserved, on the ground that it had not been shewn that the husband never was in the province.

This was an action on an agreement in writing, specially declared on in the first count, and declared on as a specialty in the second count, with common counts for money lent, account stated, and for interest. The defendant pleaded nunquam indebitatus to the first, non est factum to the second, and also payment and the Statute of Limitations to the several counts. The plaintiffs took issue as to the payment, and replied to the Statute of Limitations, that the plaintiffs were beyond seas when the action commenced; which the defendant in a rejoinder denied. The plaintiffs obtained a verdict for 346*l.* 15*s.*, and the counsel for the defendant moved to set it aside, and to enter a nonsuit on leave reserved at the trial. The objection taken at the trial applied to the second count, in which the writing sued on is treated as a specialty, and to the want of proof sufficient to entitle the plaintiff to recover upon the issue on the Statute of Limitations.

Foster shewed cause.

ROBINSON, C. J.—The right to recover under the agreement as declared on in the first count is clear, on the evidence; and so also is the plaintiff's title to recover for money lent, and on an account stated. It can be no ground of nonsuit, therefore, that the action could not be sustained on the second count, in which the writing is treated as a specialty, though it is without a seal. An attempt was made, on the plaintiffs' part, to prove that, by the law of Scotland, where the instrument was executed, it would be, from its form, regarded in the same light as a specialty; but their failing in that, (as it is objected they did), is of no account, since they could clearly recover on the other counts; as it was a plain case of money lent, proved by the writing, with an express agreement to repay it. But then the defendant, at the trial, contended further, that the affirmative of

the issue on the Statute of Limitations lay with the plaintiffs, and that this extended to the whole cause of action declared on; and, that the plaintiffs had failed in their proof, and so could not recover. We find, on inspecting the pleadings and the evidence, that there is no necessity for disturbing the verdict on that ground. The plaintiffs have replied to the Statute of Limitations, that they were beyond the seas when the cause of action accrued, and have not since come within this province. The defendant, not pretending to affirm that if they were absent from the province, as they state, when the cause of action accrued, they have either of them since come within it, rejoins, by simply denying that they were absent from this province when the cause of action accrued; and upon that point alone issue was joined. Now it is not denied, as regards the wife, that she was in Scotland when the debt accrued; it was proved that she was, and that she has never been in Canada, but is still resident in Scotland. The objection is, that no proof was offered as respects the husband's absence; but it is plain on the record and documents in evidence, that the demand is for a sum of money lent by the wife to the defendant, her brother, before her marriage; that the husband, therefore, is suing in right of his wife, and that the cause of action accrued to him by and upon his marriage, which must have taken place beyond the seas, because it is proved that his wife was never in Canada, but has always resided in Scotland, where of course she must have been married, as indeed the documentary evidence did, in point of fact, shew; the verdict therefore was proper, and the rule must be discharged.

Rule discharged.

WATKINS v. NICOLLS.

In assumpsit, by the indorsee, against the indorser of a bill of exchange, protested for non-acceptance, the defendant pleaded that before presentment for acceptance, the plaintiff had indorsed it to A. B., who from thence hitherto, had been, and still is, the holder thereof; and the plaintiff replied, admitting the indorsement to A. B., but averred that the plaintiff had afterwards been obliged to pay the amount to A. B., and had taken up the bill from him, and at the time of the commencement of the suit, was the true holder. The court held the replication bad as an argumentative denial of the defendant's plea.

The plaintiff declared against the defendant, as indorser of a bill of exchange, for £200 sterling, drawn by one Frederick Fraser Carruthers, and directed to Messrs. De Jersy & Co., which was protested for non-acceptance. The defendant pleaded that, after the making of the said bill of exchange, and the endorsement thereof by the defendant, and before the same was presented to the said De Jersy & Co., for their acceptance thereof, as alleged, to wit, &c., the said plaintiff duly indorsed the same to one W. Wilson, Esquire, cashier of the Bank of Montreal at Toronto, and thereby ordered the sum of money therein mentioned to be paid to the said W. Wilson, and that the said W. Wilson hath from thence hitherto held, and still does hold the same, and that he, the said defendant, has been, and is liable to pay the amount thereof to the said W. Wilson, and this he is ready to verify, &c. The plaintiff replied, that, though true it is that the said bill was indorsed to the said W. Wilson, Esquire, cashier of the Bank of Montreal at Toronto, as in the defendant's plea mentioned; yet the defendant had refused to pay the same, and the same

was thereupon afterwards, and after such refusal of payment by the defendant as aforesaid, and before the commencement of this suit to wit, &c., returned by the said W. Wilson, cashier, as aforesaid, to the said plaintiff, and he was forced, and obliged to, and did then, pay to the said W. Wilson, the amount thereof, and the said plaintiff then became, and was, and still is the holder of the said bill, and lawfully entitled to receive payment of the said sum of money therein specified, and this he is ready to verify, &c. Special demurrer, assigning for causes, that the plaintiff's replication amounts to an argumentative traverse of the principal matters in the said plea, that the same has no proper conclusion, and is in other respects informal and insufficient. Joinder in demurrer.

Eccles in support of demurrer.

J. Duggan, contra.

ROBINSON, C. J.—The conclusion with a verification is proper, because the plaintiff does not simply deny the statement in the plea, but pleads new matter, viz.: that the note being dishonored, after he had indorsed it to Wilson, it was paid by him to Wilson, and returned to him. It might, perhaps, have been good either way, as in many cases cited, in the note to Saunders, 103. It is objected, however, that this is an argumentative denial only of the plea, by setting up affirmative matter inconsistent with it. It is a general rule certainly, that two affirmatives, or two negatives, do not make an issue; and that to make a good issue, there must be an affirmative and a negative; but there are exceptions to this, and it is laid down as a qualification of the rule, "that it is not necessary that the negative and affirmative should be in precise words, and it will suffice, though there be two affirmatives, if the second is so contrary to the first that both cannot in any degree be true." (a). Here the plaintiff sues, shewing himself to be the holder of the bill: the defendant says another person held the bill, and still holds it, by indorsement from the plaintiff; the plaintiff answers, "true it is I did once indorse it to him, but when it was returned dishonoured, I paid him the money, and he gave me back the bill, and I have since held and now hold it, and am entitled to receive the amount:" (b) he merely re-affirms, in effect, his right as holder, which the defendant had denied. "When there are two affirmatives, which do not impliedly negative each other, a special traverse may be necessary." (c) Upon these considerations and authorities, I should have been inclined to hold the replication good without a special traverse, but the case cited, (d) seems a decisive authority in favour of the defendant, establishing that the denial in this case of the defendant's plea, is argumentative only; there must, therefore, be judgment for the demurrer.

JONES, J.—It appears to me, that the replication is an argumentative denial of the defendant's allegation, that Wilson was the holder of the bill, at the commencement of the action. The plaintiff should have denied the statement directly, that Wilson was the holder of the bill at the time, &c., and thus have taken the issue tendered; or, having admitted that he was at one time the holder, and then stated that he had returned it to the

(a) 1 Chit. Rep. 684. Co. Lit. 126 a.

(b) 8 M. & W. 629; 1 Manning & Gr. 288, 806; 1 Saunders, 103, note 3; 2 Str. 871.

(c) 1 Wils. 233; Saunders 22, Note 2; Chitty Plead. 1 vol. 648.

(d) 8 M. & W. 629.

plaintiff, who became and was the holder, he should have added the special traverse "without this, that Wilson at the said time when, &c., was the holder of the bill." It was in the option of the plaintiff to have taken the direct issue tendered, and to have concluded to the country; or he could have stated the return of the bill to the plaintiff, and reaffirmed that he was the holder, adding the special traverse. But the allegation that the plaintiff was the holder of the bill, I think not good, without the special traverse. The example given (No. 1) by Mr. Stephens, in his treatise on pleading, is precisely this case, and the case in S. M. & W. 629, cited in argument, is an authority against the replication.

Judgment for defendant.

O'BRIEN v. HARAHY.

Where the plaintiff declared in trespass quare clausum fregit, laying the entry on the close under a videlicet on 10th April, 1844, and on divers other days and times, and averred that during the time aforesaid, to wit, on 10th April, 1844, the defendant took and carried away divers goods and chattels (not averring them to belong to the plaintiff), and the defendant demurred specially, because the time of taking the goods was not laid with sufficient certainty: the court held the declaration good, and refused to entertain an objection on general demurrer, that it did not appear that the goods which were complained of as the subject of seizure, were the goods of the plaintiff.

Trespass quare clausum fregit. The plaintiff complains that on the 10th April, 1844, and on divers other days and times between that day and the commencement of this suit, the defendant broke and entered the plaintiff's dwelling house; and during the time aforesaid, to wit, on the 10th April, 1844, took and carried away divers goods and chattels, (not stating them to be the goods and chattels of the plaintiff), and converted them to his own use. Demurrer; because it is not stated with sufficient certainty at what time the defendant committed the last mentioned trespass as to the goods, &c. Joinder in demurrer.

Eccles, for demurrer, excepted to the declaration also, because it did not state the goods taken away to be the goods of the plaintiff.

Duggan, contra.

ROBINSON, C. J.—We do not see that there is anything in the only cause of demurrer assigned. The plaintiff declares in trespass quare clausum fregit. He complains that the defendant on the 10th April, 1844, and on divers other days and times &c., broke and entered &c.; and that during the time aforesaid, viz. *on the 10th April, 1844*, he took and carried away from the said close, divers goods and chattels, viz. &c., (specifying them), and converted them to his own use. The defendant demurs to this count, because it does not state with certainty the time when he took the goods &c.; but it does state a day, the 10th April, and that is not made the less certain by his saying that it was during the said time, viz. *on the 10th April, 1844*. The defendant, on the argument, took another exception to the declaration, which he had not made one of his grounds of demurrer, and therefore it cannot prevail unless it is a good exception on general demurrer. It is this; that the count does not state that the goods alleged to be taken were the goods of the plaintiff, and yet he claims damages for them; no doubt that is informal, and in an action

for taking the goods only, would be fatal; (a) but the trespass here is to the freehold, the other is mere aggravation, and we cannot call a declaration bad which contains a good cause of action, as this clearly does.

JONES, J.—I think the declaration good. The trespasses to the close are alleged to have been committed on the “10th April, 1844, and on divers other days and times between that day and the commencement of the suit;” and it is further alleged, “that the defendant, during the time aforesaid, to wit on the 10th day of April aforesaid, took certain goods and chattels &c.” It appears to me that the trespasses to the close are properly laid, not with a continuando, as contended by the counsel for the defendant, but as having been committed on a day certain, and on divers other days and times &c.; and that to the goods, on a specific day. If the trespasses to the close could be regarded here as laid with a continuando, the continuando in this count does not extend to the taking of the goods. The special cause of demurrer assigned, wholly fails, viz., “that it does not appear with sufficient certainty, at what time the defendant committed the last mentioned trespass.” Regarding the alleged trespass to the goods, as an independent trespass, it is stated distinctly to have been committed on the 10th April, and is moreover but aggravation, the trespass to the freehold being the gist of the action. It is clear that the goods not being alleged to be the goods of the plaintiff, would be exceptionable on special demurrer, if the action were for trespass to the goods alone; but not on general demurrer, or in arrest of judgment. (b) In this case the trespass in taking the goods being mere aggravation, the omission to state them to be the goods of the plaintiff would not now be bad, even on special demurrer. (c) When a trespass is laid with a continuando, in a case in which it cannot properly be so laid, having been terminated by a single act, such as the cutting of trees, the plaintiff would at the trial be confined to evidence of one trespass; but the objection cannot be taken on general demurrer, or in arrest of judgment. (d)

HAGEMAN, J.—I think that the allegation that the goods were carried away is but an aggravation of the substantial trespass to the freehold alleged to have been committed on the 10th April, and that it is immaterial to whom the goods belonged. The cause of action is sufficiently stated, without any reference to them; even if they were stated to be the property of a third party unconnected with the suit, but in the possession of the plaintiff, it would not have been cause of demurrer.

Judgment for plaintiff.

BOULTON v. FITZGERALD ET AL.

Where in trespass quare clausum fregit, the defendant had pleaded a special plea, to which the plaintiff had demurred, but in making up the nisi prius record, had omitted to enter the joinder in demurrer, the court held that an amendment by allowing it to be added, was properly made at the trial. In ordinary cases in this court, there is no necessity for the plaintiff to issue writs of *venire facias*, and *habere corpora juratorum*.

Trespass for breaking and entering the plaintiff's close, 2nd count for an assault. The defendant, Catherine Fitzgerald, pleaded first, not guilty; secondly, to the first count, that the plaintiff was not possessed of the

(a) 2 Lev. 156.

(b) Ld. Raym. 239.

(c) 2 Saund. 74, (n. 1); 3 Wils. 292.

(d) Ld. Raym. 796; 7 Mod. 152; Ld. Raym. 823, S. C.; 1 Saund. 24, (n. 1).

close, &c.; thirdly, a special plea to the first count, to which the plaintiff demurred; fourthly, to the second count son assault demesne; fifthly, to the second count, justification of assault in defence of the possession of her dwelling house.

Against Thomas Fitzgerald there was judgment by nil dicit. The nisi prius record contained no entry of a joinder in demurrer to the 3rd plea; and the award of venire facias was only to try the issues, and assess contingent damages on the demurrer, as between the plaintiff and Catharine Fitzgerald, taking no notice of the other defendant Thomas Fitzgerald. After the jury had been sworn, these defects were pointed out by the defendant's counsel, and the plaintiff moved to amend, by adding a joinder in demurrer, and amending the award of venire facias so as to authorise damages to be assessed against Thomas Fitzgerald, on his default. The jury found for the plaintiff on both counts, and £5 damages (against both the defendants) and they assessed the damages against Catharine Fitzgerald, on the demurrer, at one shilling. The defendant, Catharine Fitzgerald, moved by *A. Wilson*, her counsel, "to set aside the verdict with costs, the damages having been assessed jointly against both defendants, though there was no award of venire facias juratores on the record, as against Thomas Fitzgerald; and, for want of any writs of venire facias, and habeas corpora juratorum being actually taken out; because there was no panel of jurors annexed according to the statute; and to shew cause why the amendment, which was conditionally made, should not be disallowed, with costs, there being no power in the judge or the court to make such an amendment; nor any thing to amend by, and because the defendant, Thomas Fitzgerald, did not appear at the trial," the damages having been assessed jointly against both the defendants.

Eccles showed cause.

ROBINSON, C. J.—We are of opinion, as we have already declared, that according to the proper construction of the jury act, and of our several King's Bench Acts, and according to the constant practice of this court under those Statutes, there was no necessity for taking out any writs of venire facias, or habeas corpora juratorum, in this case; nor any necessity of annexing a panel of jurors; of course there could be none annexed to the writs, if there were no such writs, as in practice there are not; and as we think, there need not be. With regard to the other objections; Catherine Fitzgerald appeared and defended at the trial, and therefore should not be allowed to move on the ground of irregularity; she should have stood upon the objections if she meant to persevere in them, and cannot take the chance of the trial, as well as of her objections. (*a*) Besides, it does not lie in the mouth of this defendant to object that there was no authority to assess damages against the other trespasser, Thomas Fitzgerald; and, as to the amendment in that particular, if the right to make it were questionable, still, before this defendant could be relieved from the verdict, on account of excess of power in making that amendment, she should show by affidavit, that she had a good defence, and has been prejudiced by the amendment (*b*); but this part of the case does not concern her. As to the non-joinder in demurrer, it was competent to the

(*a*) *Farwig v. Cockerton*, 6 Dowl., 337.

(*b*) *Stansbury v. Matthews*, 7 Dowl. 29; *Wood v. Peyton*, Exchequer, 16th Nov., 1844.

plaintiff himself, under the 19th rule (of the new rules, Easter Term, 5th Victoria), to have added the joinder in demurrer, and therefore it might be done at the trial; he was at liberty, by the terms of the rule, to proceed as if issue at law had been joined.

Rule discharged.

HUTT v. KEITH.

In a declaration by the assignee of a replevin bond, it is bad, on general demurrer, to declare in the form used in England, with an averment of a plaint made to the sheriff.

The plaintiff declares as assignee of the sheriff of the Niagara District, for that whereas the now plaintiff distrained certain goods and chattels of one John Mowers, for a certain sum of money then claimed to be due to the now plaintiff for rent; and the said goods and chattels being so distrained, the said John Mowers, afterwards, to wit on the 3rd day of April in the year aforesaid, made his plaint to the said William Kingsmill, then being sheriff of the said District of Niagara, for the taking and unjustly detaining of the said goods and chattels of the said John Mowers, by the now plaintiff, and then prayed the said sheriff that the said goods and chattels might be forthwith replevied by the said sheriff, and delivered to the said John Mowers; and thereupon the said William Kingsmill so being sheriff of the said District of Niagara, according to the form of the statute in such case made and provided, did take from the said John Mowers, and from the now defendant and one John Gilleland, as two responsible sureties, a bond in double the value of the said goods and chattels so distrained as aforesaid; and the said John Mowers and the now defendant and one John Gilleland, on the said third day of April in the year aforesaid, by their certain writing obligatory sealed with their respective seals, and now shewn to the court here, the date whereof is the day and year last aforesaid, did jointly and severally acknowledge themselves to be held and firmly bound unto the said William Kingsmill so being sheriff of the said district of Niagara, in the said sum of one hundred pounds above demanded to be paid to the said sheriff, with a condition thereunder written that if the said John Mowers should prosecute his suit with effect and without delay against the plaintiff for taking and unjustly detaining of certain goods and chattels in the said condition mentioned, and should make return thereof if return should be adjudged by law, then the said obligation was to be void and of none effect, otherwise to be and remain in full force; and thereupon the said sheriff afterwards, to wit on the day and year last aforesaid, at the prayer of the said John Mowers, replevied and made deliverance of the said goods and chattels to the said John Mowers, according to the duties of his office; and afterwards, to wit on the day and year last aforesaid, the said John Mowers did sue out of her Majesty's Court of Queen's Bench at Toronto, the writ of our Lady the Queen, against the plaintiff, according to the statute in that case made and provided, for the taking and unjustly detaining of the said goods and chattels of the said John Mowers, to which said writ the plaintiff duly appeared according to law. And thereupon the said John Mowers, afterwards, to wit on the first day of August, 1843, in the court of our said Lady the Queen before the Queen herself at Toronto

aforsaid, by Charles Lethum Hall his attorney, declared against the now plaintiff in the said plea of taking and unjustly detaining his said goods and chattels; and by the said declaration, the said John Mowers, by the said Charles Lethum Hall his attorney, complained that the now plaintiff, on the 1st day of April in the year aforsaid, at the township of Grantham in the district of Niagara, took the goods and chattels of the said John Mowers in the said declaration more fully and particularly described, and them unjustly detained &c., to the damage of the said John Mowers of 300 $\text{l}.$, and thereupon he brought his suit &c. And such proceedings were afterwards, to wit, on the 20th day of February, 1844, thereupon had in the said plea in the said Court of Queen's Bench of our Lady the Queen before the Queen herself, that it was considered and adjudged in and by the said court, that the said John Mowers should take nothing by his said writ, but that he and his pledges to prosecute should be in mercy &c., and that the now plaintiff should go thereof without day, and that the now plaintiff should have a return of the said goods and chattels, as by the record and proceedings thereof now remaining in the said court of our said Lady the Queen before the Queen herself, at Toronto aforsaid, more fully appears. And the now plaintiff saith, that the said John Mowers did not prosecute his said action with effect against the now plaintiff, for the taking and alleged unjustly detaining the said goods and chattels, or make a return of the said goods and chattels, or any part thereof, according to the form and effect of the said condition of the said writing obligatory, but hath hitherto wholly neglected and refused and still wholly neglects and refuses so to do; whereby the said writing obligatory became forfeited to the said William Kingsmill, so being sheriff of the said district of Niagara as aforsaid; and the same being so forfeited, the said sheriff, afterwards, to wit on the 25th day of June, 1844, at the request and costs of the now plaintiff, by an indorsement on the said writing obligatory, duly made and sealed with the seal of office of the sheriff of the said district of Niagara, assigned the said writing obligatory to the plaintiff, according to the form of the statute in such case made and provided, as by the said assignment indorsed on the said writing obligatory as aforsaid, and to the court of our said Lady the Queen now here shewn, the date whereof is the day and year last aforsaid, will fully appear. Usual conclusion and breach. The defendant having set out the condition of the bond on oyer, demurred. The condition was as follows: The condition of this obligation is such, that if the above bounden John Mowers do prosecute his suit with effect, and without delay, against George Hutt, of the township of Stamford, in the District of Niagara, yeoman, for the taking and unjustly detaining of his cattle, goods and chattels, to wit, one span of horses, one yoke of oxen, one yoke of steers, one heifer, three cows, one waggon and harness, one sleigh, ten acres of wheat, fourteen hogs, two feather beds with pillows, and every other article of household furniture, and do make a return of the said cattle, goods and chattels, if a return thereof shall be adjudged, that then this present obligation shall be void and of none effect, or else to be and remain in full force and virtue.

E. C. Campbell, for the plaintiff.

R. E. Burns, for the defendant.

ROBINSON, C. J. This is an action upon a replevin bond. The defendant demurs specially to the declaration, assigning two causes of demurrer;

first, that the declaration, in setting forth the condition of the replevin bond, has varied from the condition of the bond, as it is afterwards set out on oyer; and second, that it is not stated in what term or on what day judgment was given against the plaintiff in the action of replevin. There is nothing fatal, I think, in either of these exceptions. The declaration does not profess to state the bond in *haec verba*, but only according to its legal effect. It is not usual to set out in the declaration the particular articles taken, though these are inserted in the condition of the bond. (a) It is truly stated that the bond was given for the return of certain *goods and chattels* distrained, whatever might be enumerated in the condition itself, for all that could be distrained must come within the words goods and chattels. As to the not stating when the judgment in the replevin action was rendered, the objection does not hold in fact, for the averment is, that "afterwards, to wit, on the 20th February, 1844, such proceedings were thereupon had, that judgment was rendered &c." The usual and more proper form of making the statement is, that such proceedings were thereupon had, that afterwards, viz. on, &c., judgment was rendered, which more expressly connects the time with the entry of the judgment; but the effect of the statement in this declaration is the same; for, if afterwards, viz., on such a day, &c., such proceedings were had, that judgment was entered, the judgment must on that day have been entered, otherwise it could not be true that such proceedings were had on that day, as is stated. But it would have been, I apprehend, a sufficient breach of the condition to have alleged merely that the plaintiff in replevin did not prosecute his suit with effect, and without delay, in the very words of the condition, without going into the detail about the action. (b) The defendant, in the argument, took another objection to the declaration, namely that it states that the plaintiff in replevin made his *plaint* to the sheriff, &c., (as in the English forms) which is inapplicable to our system of proceeding in the action of replevin, and inconsistent with truth. The sheriff in this country having no county court, no such plaint could be made to him. How the proceedings could be regularly conducted before our statute 7 Wm. 4, ch. 7, we need not now enquire; but under that statute the person wishing to replevy merely files his precept in the Crown Office, and obtains from this court a writ commanding the sheriff to replevy, the original jurisdiction being in this court, and not in the sheriff's court, and the sheriff acting under the express command in the writ, and not otherwise. The statement therefore, in this declaration is, in that respect, inaccurate. The defendant did not assign this as cause of demurrer, but he gave notice of it in the demurrer books delivered by himself, and we are bound, therefore, to consider whether it is a good exception to the declaration, on general demurrer: It will of course, be such, if the bond, given as averred, without the authority of a writ, and not in accordance with our statute, would be void. I am of opinion that this objection to the declaration is good, on general demurrer. When the plaintiff refers to the statute, and says the sheriff took a bond, according to the statute, &c., he must be intended to mean the statute which really does regulate the proceedings in replevin, viz., our statute,

(a) 3 M. & S. 180.

(b) 5 B. & C. 302; 5 T. R. 195; 8 M. & W. 477; 1 Dowl. N. S. 69.

4 Wm. IV, ch. 7 : then he states that to have been done according to the statute, which is wholly repugnant to the statute. There can be no plaint to the sheriff, and he cannot on any such plaint, take a bond, but only on a writ from this court. He could not assign a bond, taken as this declaration describes it, so as to give the plaintiff a right to sue on it.

JONES, J.—The objection upon general demurrer, I think good. There can be no plaint to the sheriff, as stated in the declaration, which could authorise him to take the bond assigned to the plaintiff, and sued upon by him ; but a writ, founded upon a præcipe, issues from the Crown Office, directed to him, and under which he proceeds. If the action were in the name of the sheriff, the allegation might, perhaps, be struck out as surplusage, but here the action is brought in the name of the sheriff's assignee, and there is no authority for the sheriff to assign a bond which is not taken under the statute. The objection was stated in the margin of the demurrer book, which is according to the rule of this court; notice of the objection is not required to be given to the party. An amendment of the rule requiring such notice, I think would be an improvement.

Leave to plaintiff to amend.

HENDERSON v. HARPER.

Where in trespass quare clausum fregit, the defendant pleaded liberum tenementum, and the plaintiff replied that the defendant had leased the premises to the plaintiff *at will*, and that under the demise he entered and was possessed, until the defendant broke and entered &c., the replication was held bad on general demurrer.

The plaintiff declares in trespass, for that the defendant on the 1st day of January, 1844, and on divers other days, &c., broke and entered the plaintiff's dwelling house, situate on his close (described), and made a great noise therein, and continued therein for a long time, &c., and broke to pieces doors and fastenings, &c., and ejected, expelled, put out and removed the plaintiff and his family from the possession of the dwelling house, and kept him ejected for a long space of time, &c. The defendant pleads that the close was his freehold, &c. The plaintiff replies that the defendant had demised to him, to hold at the will of the defendant, and that he entered and was possessed under that demise, &c., until the defendant &c., wrongfully broke and entered into the dwelling house, and committed the trespasses in the declaration mentioned. The defendant rejoins that he entered peaceably, in order to determine the tenancy, and did then and there, and thereby express and declare his will that the tenancy should be then ended and determined, and did then and there, and thereby end and determine the tenancy, as he lawfully might : and he justifies making a noise, continuing in the house, breaking doors, locks, &c., (because the rooms and passages were fastened,) and putting out the plaintiff and his family from the possession, as being acts which he lawfully might do for the cause aforesaid. The plaintiff to this surrejoins de injuria, and the defendant demurs specially to this surrejoinder.

K. McKenzie for the demurrer.

A. Campbell, contra.

ROBINSON, C. J.—The replication is bad ; for a tenant *at will* can only maintain the action when the injury to the land, during the continuance

of the estate, was done by a stranger, for when the injury was by a person who entered under color of title, trespass will not lie. (*a*). If the lessor does a wrongful act, it amounts to a determination of the will; (*b*) though an act which does not disturb the possession, does not amount to a determination. (*c*). It is of the very nature of a tenancy at will, that the lessor may oust the tenant at what time he pleases; (*d*) and this being so, there can be no excess except some act which would subject the lessor to a criminal prosecution, according to the doctrine in *Taylor v. Cole*, 3 T. R. 396. If the lessor enter and cut down trees, or turn his cattle into the fields of his tenant at will, without his assent, it is a determination of his will, not by any express words, but by implication; and there can be no act more unequivocal than the very act complained of here, the turning the tenant out. If the plaintiff meant to insist on damages for any of the acts complained of as aggravation of the trespass, *quare clausum fregit*, as for the expulsion, he should have replied the excess. (*e*)

JONES, J.—The plaintiff, on the argument, objected to the rejoinder of the defendant, as showing no sufficient justification or excuse for the expulsion laid in the declaration. It appeared to me that the plaintiff should have replied excess to the rejoinder, and, upon an examination of the cases bearing upon the point, I am confirmed in that opinion. The gist of the action is the breaking and entering, the expulsion is mere aggravation. The defendant justifies the entry to put an end to the tenancy, and it was for the plaintiff to reply the expulsion which would make the defendant a trespasser *ab initio*. The Six Carpenters' case, 8 Coke, 246, establishes these two points, first, that if a man abuse an authority given to him by the law, he becomes a trespasser *ab initio*; and secondly, that when the authority is pleaded, the subsequent abuse must be replied. (*f*) The rejoinder is good, and the surrejoinder, "de injuria," bad. (*g*).

Judgment for defendant.

DOE DEM. McMILLAN v. BROCK.

If a rule nisi, for judgment, as in case of a nonsuit, for not proceeding to trial pursuant to notice, is discharged, upon a peremptory undertaking, and payment of the costs of the day, &c., the plaintiff can take no further step towards proceeding to any future trial, unless those costs are first paid, and if he does proceed, as by giving notice of trial, the defendant may treat such notice as a nullity.

The defendant had obtained a rule nisi, for judgment, as in case of a nonsuit, for not proceeding to trial at a former assize, which rule was discharged, at the plaintiff's instance, on the usual terms, according to the practice of this court, of entering into the peremptory undertaking, and of paying the costs of the day and of the application. Without paying or tendering these costs the plaintiff gave notice of trial for the last assize.

(*a*) Sid. 347; 2 Roll. ab. or Roll. Rep. 551; 13 Co. 69.

(*b*) Com. Dig. Estates, H. 7; Co. Litt. 556.

(*c*) 1 Roll. 860, l. 30, 852, line 15. (*d*) Co. Lit. sec 68.

(*e*) Selwyns N. P. 1344.

(*f*) 1 T. R. 12; 3 T. R. 292; 1 Vent. 211. 217; 3 Wils. 20; B. N. P. 81;

Cro. Jac. 147; Salk. 221; 5 Taunt. 198.

(*g*) Crogate's case, 59; 1 Bing. N. C. 380.

es, and tendering the costs to the defendant's attorney late in the assize, and just before the cause was called on, he proceeded, and for want of the defendant appearing to confess lease, entry and oustry, &c., a nonsuit was entered.

Boulton, Q. C., for the defendant, having taken no notice of the proceeding, now moved to set aside whatever had been done, since the discharge of his rule for judgment as in case of a nonsuit, as irregular on account of the costs not having been paid, or, in the alternative, for a new trial on the common affidavit of merits.

Phillpotts showed cause.

ROBINSON, C. J.—According to the practice which has always prevailed in this court, the payment of costs is a condition of discharging the rule, as well as the undertaking to try at the next assize, and, if the plaintiff fail in one particular, or the other, the original rule is to be made absolute, unless indeed the failure is excused on some satisfactory ground. (*a*) I am of opinion that the defendant was not bound to take any steps in consequence of receiving the notice of trial, under such circumstances; the plaintiff had no right to give it till he had paid the costs. It was not like a notice merely irregular in its form, it was altogether a nullity; it was a proceeding by a party, when he had no right to proceed. The payment of costs should have preceded the giving of this notice, to be of any avail to the party. But the plaintiff objects that, although the defendant is moving to set aside the nonsuit, he does not state in his affidavit the fact that the plaintiff was nonsuited at the trial for want of defendant's confessing &c., and that he is therefore not regular in his application, and ought not to succeed. The defendant, on the other hand, contends that the plaintiff was under terms not to proceed till he had paid the costs; that the fact of his having proceeded cannot be questioned in this case, because the record is in court; and shews a nonsuit, recorded by one of the judges composing the court, for the want of the defendant appearing to confess, &c. Strictly speaking, the defendant's affidavit should have stated that the act was done, of which he complains, and both parties have been irregular. We cannot, on what appears before us, allow the nonsuit to be acted upon, and therefore make absolute the rule moved for, but without the costs of this application; that is, setting aside as irregular all the proceedings since the discharge of the rule for judgment as in case of a nonsuit, but not with costs.

Rule absolute.

HARVEY v. GEARY.

Where in assumpsit by the holder of a promissory note payable to A. B. or bearer on demand, the defendant pleaded an agreement between A. B. and himself at the time the note was made, that it should be held by A. B. as a security for the settlement of their future accounts, and that it was retained by A. B. after it was due, and that he then transferred it to the plaintiff, and that on settlement A. B. was largely indebted to the defendant; the plea was held bad, on general demurrer.

The plaintiff declares as the holder of a promissory note drawn by the defendant on the 8th day of July, 1844, and payable to Theodore Reid

(*a*) *Bergin v. Whitehead*, Easter, 1 Will. 4; *Cameron's Digest* 60.

or bearer, on demand; and the defendant pleads that the said promissory note was made by the defendant at the special instance and request of Theodore Reid, the payee thereof, and then delivered to the said Theodore Reid, upon the express promise and undertaking of the said Reid that the said note should not be discounted, but should remain in the hands of the said Reid, as a security for any balance which might thereafter, upon a settlement of a running account which was then open between the said Reid and the said defendant, appear to be due from the defendant to the said Reid; and the defendant further saith, that the said promissory note remained in the hands of the said Reid, not having been negotiated, over-due and unpaid, for a long period prior to the transfer of the same to the plaintiff, to wit, till the first day of August in the year aforesaid; and the said note so being over-due, was afterwards, to wit, on the day and year last aforesaid, transferred to the plaintiff as in the declaration mentioned; and the defendant saith that the said Reid, before and at the time of the said transfer, and thence continually hitherto, was, and still is indebted to the defendant in a large sum of money, to wit, the sum of sixty pounds, for money before then paid by the defendant for the said Reid, at his request, and for other money before then had and received by the said Reid for the use of the defendant, and for goods sold and delivered by the defendant to the said Reid, at his request, and for money for which the said Reid was found to be in arrear to the defendant, upon an account stated between them, which said sum of money so due and owing from the said Reid to the defendant as aforesaid, exceeds the sum of money so due from the defendant to the plaintiff, upon and by virtue of the promissory note in the said declaration mentioned, and out of which said sum of money so due and owing from the said Reid to the defendant as aforesaid, the defendant is ready and willing, and hereby offers, to set off and allow to the plaintiff the full amount of the said sum of money so due and owing from the defendant to the plaintiff, upon and by virtue of the promissory note in the said declaration mentioned, and this the defendant is ready to verify, &c. General demurrer.

R. E. Burns, counsel for plaintiff.

Blake, counsel for defendant.

ROBINSON, C. J.—The matter here pleaded would be no defence, even between the original parties, as an understanding contrary to the terms of the note; though it might be as shewing a want of consideration at the time of the note being given, and the necessity of proof of a subsequent settlement of accounts resulting in a debt sufficient to sustain the note. But a note of this kind, payable on demand, and not at a certain day, contains no warning on the face of it to the indorsee or person taking it as bearer, that it is an over-due note; and it cannot be held to be over due, without proof of a demand before the note *was* assigned, which fact is not alleged in this plea. On this ground alone I think the plaintiff entitled to judgment on demurrer. It would seem consistent also with principle, that if there had been such a demand and non-payment before the note was transferred, the indorsee should have notice of that before he should be subject to the same equitable consideration, as might be urged before it was negotiated. It is not necessary to go farther into the case, and I will only therefore state, that I do not intend to concede that

the defence here pleaded would at any rate be a good one against an indorser.(a)

JONES, J.—A note payable on demand is not due until demanded. The defendant states that the note when transferred to the plaintiff, was over-due. This would be sufficient when the note, in the pleading, is shewn to be payable at a previous day; the statement of the time of transfer being alleged, it would appear on the record, whether it was, in fact, negotiated after it became due. It cannot so appear on a note like the one sued upon, unless a demand with time is set forth. No such demand is stated, and this being pointed to as a cause of demurrer, judgment must be for the plaintiff. Interest is not recoverable on a note payable on demand, (when it is not made payable with interest), except from the time of bringing the action, unless a demand is proved.

HAGERMAN, J.—This plea is not sustainable. Upon the authority of the case 5 Man. & Ry. 296, it is bad, as a plea of set-off; that can only be pleaded between the original parties; and the agreement, as stated by the defendant, cannot be set up as a defence against the plaintiff, who is the bona fide indorser of the note sued upon, and the more especially as it is not averred that he had any notice of such an agreement at the time the note was transferred to him.

Judgment for plaintiff in demurrer.

LYMBURNER v. NORTON.

Where to debt on an arbitration bond, the defendant pleaded performance, and the plaintiff replied setting out the award, which was for the payment by the defendant of a debt due to A. B., by the plaintiff and the defendant as copartners, that the plaintiff was forced and obliged to pay the debt to A. B., but did not shew otherwise than by inference that it had not been paid by the defendant, the replication was held bad on special demurrer.

To debt on an arbitration bond, the defendant (having obtained oyer of the bond and condition) pleaded first, performance; secondly, that the arbitrators made no award. The plaintiff replied in the same terms to both pleas, viz., that the award was made within time, and in accordance with the submission; and averring a breach by the defendant in not paying a debt, (due to one Thompson by the plaintiff and defendant as copartners), which the award ordered him to pay, and which by reason of the defendant's default the plaintiff was obliged to pay, but not expressly stating that the defendant had not after the award was made paid the debt to Thompson. Demurrer, assigning for causes, that the plaintiff in his replications does not shew any positive or distinct breach of the award, but attempts to shew that the defendant did not perform the same, by alleging that the plaintiff was forced to pay, and did pay a certain debt to one David Thompson, which, by the award, the defendant should have paid; and that the debt referred to does not appear by the said replications to have been contracted by the plaintiff and defendant, while they were in copartnership, &c. Joinder in demurrer.

Eccles, counsel for plaintiff.

R. E. Burns, counsel for defendant.

(a) 10 B. & C. 558; 1 C. M. & R. 565; 3 Dowl. 352.

ROBINSON, C. J.—I was at first inclined to consider these replications sufficient; but, on further consideration, concur with my brothers in the opinion that they are bad on special demurrer. They are the same in substance and form, and the same exception is taken to both. The plaintiff should have expressly alleged as the breach, that the defendant did not, after the award was made, pay the debt due to Thompson; all that can be said is, that he states such fact of having been forced to pay it himself as tends to shew that this defendant could not have paid it; but he only states that the debt remained unpaid when a ca. sa. was taken out against him for it. Now to shew his claim to recover what he sue for, which is the whole debt to Thompson and the costs recovered against himself, he should shew that, up to the time of bringing this action, Thompson had not paid the debt, nor any part of it. In a late case in the Exchequer, 23d Nov. 1844, of Drew et al. v. Avery et al., an exception was taken to a plea, that it did not state with certainty a certain fact necessary to the defence; and the court said “although some of the allegations in the plea afford ground for inferring that such must have been the fact, the time of the court is not to be occupied in making out the sense of a plea from all the allegations in it, but the averments ought to be clearly and distinctly made.” “The allegation” (they added) “was only to be made out by inference, and that having been pointed out on special demurrer, we ought to hold the plea insufficient.” This language applies strongly in a case where, like the present, the plaintiff is proceeding for an alleged breach; there he is always held to allege the breach plainly and clearly.

Judgment for defendant on demurrer.

LEWIS v. KIRBY.

Where a claim for goods, seized for an alleged infraction of the revenue laws, was brought before commissioners of customs, under provincial statute 4 Geo. IV., ch. 11, and the commissioners upheld the claim and restored the property to the claimant, *without any trial or verdict* passing upon the matter, but gave a certificate to the officer of customs, who had seized, that there was a probable cause of seizure, such certificate, however, not being entered of record in any way: Held, in an action of trespass against the officer for the seizure, that the certificate afforded him no protection, either under the provincial statute 4 Geo. IV. ch. 11, sec. 27, or the imperial statute 3 & 4 Will. IV. ch. 59, sec. 72.

The plaintiff declares in trespass for taking two horses, a waggon and harness. The defendant pleads the general issue “by statute.” The defendant is collector of customs at Fort Erie. The plaintiff had gone from the district of Niagara in this province, to the state of New York, taking with him his horses and waggon; one of his horses falling ill there, he had purchased another to replace him, and on his return, omitting to report this horse as being liable to duty, he was allowed to pass, under the belief that he had the same horses as those he had taken over. The collector, however, being soon after informed of the change, sent instructions to his deputy, on the following day, to seize both the horses and the waggon and harness, claiming that all were liable to seizure, on account of the one horse not having been entered, and the duty paid. The case came on before the commissioners of customs for the district,

but they dismissed it, and restored the property, because the goods had not been appraised within forty-eight hours after seizure; they however gave a certificate under their hand, that there was a probable cause for seizure. (It was sworn by the clerk of the commissioners that there was no regular record usually made up in such cases, but merely an entry of their proceedings made in a book). The defendant's counsel relied upon this certificate, as a protection under the imperial statute 3d & 4th Will. IV. ch. 59, sec. 72,(a) and under our statute 4 Geo. IV. ch. 11, sec. 27 ;(b) and he further moved the judge to certify as judge at the trial, under the imperial statute mentioned, that there was probable cause of seizure, in order that the plaintiff should be deprived of costs. Both points were reserved for consideration, and the jury were requested to assess the damages for detaining the horse not liable to seizure, and the waggon and harness; they found a verdict for the plaintiff,—7l. 10s. damages.

The Solicitor General moved for a new trial, on the law and evidence, and for misdirection.

R. Miller, shewed cause.

ROBINSON, C. J.—The first question is, whether the certificate given by the commissioners of customs, that there was probable cause of seizure, should have been held to entitle the defendant to a verdict in this action. It seems that in the proceedings before the commissioners for condemnation of the horses and waggon, they ordered all to be restored, not even condemning the horse which had been purchased in the United States, and imported from thence without paying duty; they did this upon the ground that the things seized were not appraised within forty-eight hours, as the 4th Geo. IV. ch. 11, sec. 21, requires, which certainly seems no reason for releasing the goods, it being a mere direction of the statute, and nothing more. It is urged, however, that the commissioners having dismissed the case on that ground, cannot be supposed to have heard the merits, and therefore were not in a condition to certify as to the cause for seizure. I do not see that we could come to that conclusion, for we should be bound to assume that the court acted reasonably, and in good

(a) That in case any information or suit shall be brought to trial, on account of any seizure made under this act, and a verdict shall be found for the claimant thereof, and the judge or court before whom the cause shall have been tried, shall certify on the record that there was probable cause of seizure, the claimant shall not be entitled to any costs of suit, nor shall the person who made such seizure be liable to any action, indictment or other suit or prosecution, on account of such seizure; and if any action, indictment or other suit or prosecution, shall be brought to trial against any person on account of such seizure, wherein a verdict shall be given against the defendant, the plaintiff, besides the thing seized or the value thereof, shall not be entitled to more than two pence damages, nor to any costs of suit, nor shall the defendant in such prosecution be fined more than one shilling.

(b) That in case any information shall be commenced and brought to trial on account of the seizure of any vessel, boat, raft or carriage, cattle, horse or horses, harness, tackle, apparel, furniture, goods, wares or merchandize, or other things whatsoever, as forfeited by this act, wherein a judgment shall be given for the claimant, and it shall appear to the court before whom the same shall be tried, that there was a probable cause of seizure, the court shall certify on the record that there was a probable cause for seizing the same, and in such case the plaintiff shall not be entitled to any costs whatsoever, nor shall the person who seized be liable to any action or prosecution on account of such seizure.

faith, unless the contrary appears; and they certainly may have had in proof before them all the grounds of seizure, or the claimant may have admitted them fully, and yet rested his defence on the supposed absolute necessity of an appraisement within forty-eight hours, in order to the condemnation of the goods. We should, for all that appears in evidence, here conclude, I think, that the commissioners did not certify without means of knowledge, and also, that there was probable cause, since they have declared there was; but still it would have remained a question, whether the certificate was so given as to make it a protection under the statute. The case however, in my opinion, depends not upon the provincial statute 4 Geo. IV. ch. 11, sec. 27, but upon the imperial statute 3 & 4 Will. IV. ch. 59, for the provincial statute only allows the certificate to be given after a trial of information for goods seized *as forfeited by that act*; but these horses, waggon and harness, must be looked upon as being seized as forfeited, not under that act, but under the imperial statute 3 & 4 Will. IV. ch. 59. sec. 34, and previous sections (see section 17), for this statute supersedes the provincial enactments, where it applies as it does in this case. I discover nothing in the alterations made in this act by the 5 & 6 Vic. ch. 49, which can affect this question. Then the 72d clause of 3 & 4 Will. IV. ch. 59, enacts, "that in case any information or suit shall be *brought to trial*, on account of any seizure made under this act, and *a verdict shall be found for the claimant thereof*, and the judge or court before whom the cause shall have been tried, *certify on the record*, that there was probable cause of seizure, the claimant shall not be entitled to any costs of suit, nor shall the person who made such seizure be liable to any action, indictment or other suit or prosecution, on account of such seizure." The question is, was the certificate from the commissioners of customs of the district of Niagara, which was produced at the trial of this cause, such a certificate as satisfies the provisions of the 72d clause of 3 & 4 Will. IV. ch. 59. The grounds on which the protection is resisted are, first, that the information or suit was not "*brought to trial*," but was dismissed, and the goods restored, (perhaps erroneously), on a preliminary objection that they had not been duly appraised; secondly, that "*a verdict was not found for the claimant*," for it was not the case of a trial *by jury*, and even if such a proceeding can be acted upon as analogous, yet there was not that judgment of the commissioners which could correspond with the verdict, but a mere order that the goods should be restored without a trial of the cause of seizure; thirdly, the court did not *certify on the record* that there was probable cause of seizure, for there was nothing but a loose detached certificate produced, which may have been furnished at any time, and bearing no reference to any trial. The question under this clause of the imperial statute is very different from that which would have been presented, if we could have looked upon the commissioners as proceeding upon an information for a cause of seizure under our act 4 Geo. IV, because then the case, as regards the certificate, would have come under the 27th clause of that statute, which says nothing about a verdict. I am of opinion that we cannot apply the protection given by the 72d clause of the imperial statute, to a case of which the circumstances are so different. The terms of the statute are, "if the case shall be *brought to trial*, and a verdict shall be found for the claimant, and the judge or court before whom the case was tried, shall certify on the

record." Can we apply this provision to a case which, strictly speaking, was not brought to trial, in which no verdict was given, or could be given, because no jury passed upon it; and in which no judge has certified upon the record, because there was no record? A certificate, given on a loose piece of paper, having no semblance to a record, and given, for all that appears, at any time after the case was called on, in a case in which there never was a verdict, cannot, in my opinion, prevail against the Statute of Gloster, which gives a party a right to costs, in all actions in which he recovers damages. It may come within the reason of the provision, or rather, it may be reasonable for the legislature to extend their enactments, so as to embrace such a case; but I cannot say that we have power to enlarge the provision to that extent. The commissioners of customs are clearly a court of record; they are expressly made such by statute; if they proceed, without any roll or record being made up, in each particular case, then we must look upon their minutes, entered at the time in their book, as their record, and their certificate should have been entered there; or, perhaps, in a record of the case made up afterwards, for the very purpose of endorsing a certificate upon it; but a loose writing like that produced, and when there had been no verdict for the defendant, does not come within the provisions, and the defendant must abide by the consequences of the verdict, which is fortunately not excessive.

JONES, J., and HAGEMAN, J., concurred.

Rule discharged.

HISCOTT v. Cox.

To a declaration in trespass quare clausum fregit, setting out the close by metes and bounds, the defendant pleaded that the part of the close on which the alleged trespass was committed, was his close, and the plaintiff replied that the close mentioned in the declaration was his close, and not the close of the defendant, as stated in the plea: The replication was held good on special demurrer.

Trespass quare clausum fregit, described by metes and bounds, &c. The defendant pleads that the part of the close on which the alleged trespass was committed is his close. The plaintiff replies, *that the close mentioned in the declaration* is his close, and not the close of the defendant in manner and form as set out in the plea. Special demurrer, assigning for cause that the replication does not directly deny that the close, &c., was the property of the defendant, but offers an argumentative answer to that fact, viz., that the close was the property of the plaintiff, and improperly concludes to the country, instead of with a verification, &c.

Eccles for demurrer.

Boulton contra.

ROBINSON, C. J.—The replication, in my opinion, is good so far as regards the causes of demurrer assigned; it does expressly negative that the close was the property of Cox, which negative is not the less direct and conclusive, because he repeated the statement that the close was his own. The issue is complete, and properly concludes to the country. There is no note in the demurrer book of any other objection intended to be raised, and therefore we need not go into the supposed defect of the replication, in denying that the close in the declaration was the close of

the defendant, whereas the defendant had only pleaded that the part of the close on which the trespass was committed, was his. On the issue, as raised, the plaintiff must, at the trial, prove a trespass on some part of his close, to which the defendant cannot prove title, or he will fail; and when in his replication he asserts that the whole close is his, he certainly answers the plea in substance at least, for it cannot be all the plaintiff's close, if a part belongs to the defendant; the replication ought to have said, that the part of the close in which the trespass was committed, was the close of the plaintiff, and not of the defendant. It was unnecessary for the defendant to plead *liberum tenementum*, when the plaintiff had described his close with certainty; he should merely have denied the plaintiff's possession.(a) But he is under no difficulty on these pleadings, for he could, under no circumstances, be bound to prove a title to the whole close; he must be entitled to a verdict, if he establishes a title to that part of the close on which the trespass was committed, even if he had pleaded that the close as described was his; it is therefore, mere informal pleading. (b).

JONES, J.—The defendant does not say "that the close mentioned in the declaration is his close," but alleges that a part of it, as described, "is his close," and therefore, it was not strictly correct for the plaintiff to affirm, that the close, as set out by him in the declaration, is his close, and not the defendant's, when the defendant, in his plea, asserted that the close so set out by the plaintiff, is his close. The plaintiff should have denied that the close described by the defendant was the close of the defendant; or, he might have re-affirmed that the close described in the declaration, was his close, adding a special traverse, that the close described by the defendant in his plea, was not the close of the defendant; but that part of the replication which says that "the close mentioned in the declaration is his close," is unimportant, and may be regarded as surplusage. I entertained a different opinion at first, but the case in Willes 218, and the opinion expressed in 2 Selw. N. P. 1355, shew that the replication, although inartificially drawn, is not bad.

HAGERMAN J. concurred.

Judgment for plaintiff.

HAMILTON, EXECUTRIX, v. DAVIS AND FORD.

To debt on an indemnity bond, the defendant pleaded, *non damnificatus*, and the plaintiff having replied, shewing how she was damned, the defendant rejoined that the injury arose through the plaintiff's own fraudulent act. The rejoinder was held a departure, and bad on general demurrer.

Debt on bond, conditioned to indemnify Alexander Hamilton, sheriff of the Niagara District, in all actions that might be brought against him, his heirs, &c. by two men employed by the sheriff to guard the property of James Davis, when seized by the sheriff, on an execution against Davis et al., at the suit of Matthew Crooks, for wages claimed, and in the costs and charges of such actions. The defendants plead first, *non damnificatus*, and secondly, performance. Replication, *damnificatus* to 20*l.* 1*s.* 8*d.* Rejoinder, that the two men had no cause of action, &c. and that the

(a) Willes, 224.

(b) 8 M. & W. 381; 1 Dowl. N. S. 24; 1 B. & C. 489; 2 Bing. 49.

plaintiff fraudulently procured them to bring the actions. Special demurrer assigning for causes, that the rejoinder is double in that it offers two separate and distinct answers to the replication, for that first it denies that the two men had any cause of action against the plaintiff, &c., and secondly it alleges that the plaintiff fraudulently procured them to bring the actions against her.

Eccles, for demurrer, urged as a ground of general demurrer that the rejoinder was a departure from the plea.

R. B. Sullivan, contra.

ROBINSON, C. J.—The only cause of demurrer assigned does not hold; both allegations are necessary to make out the defence. As to the departure, that seems to require more consideration. *Owen v. Reynolds*, (a) is in appearance at first sight like the present case, but it does not in fact resemble it. There the condition was to indemnify from tonnage due to A.; the defendant pleaded non *damnificatus*. The plaintiff replied that A. distrained for tonnage. The defendant rejoined that nothing was due to A. for tonnage. The decision of this case turned upon the words of the condition, which was only to indemnify against tonnage actually due to A.; it was strictly true, therefore, that being distrained upon for tonnage not due to A., gave no claim under the bond, and was not within the indemnity promised; so the defendant could truly plead non *damnificatus*, and his rejoinder afterwards that the tonnage was not due to A., only fortified his plea. We are compelled, we think, by the authorities, to hold this a departure. (b)

JONES, J., concurred.

HAGERMAN, J.—The plea, in this case, denies that the plaintiff sustained any damage or injury from the cause set forth in the declaration. The rejoinder admits she did, but alleges that it was in consequence of her own misconduct. Is not this a departure from the plea? I think it is. (b) If the defendant pleads non *damnificatus* generally, and the plaintiff replies and shews how *damnified*, and then the defendant replies he was *damnified* of his own wrong, it is a departure. (c)

DOE DEM. JOHN MCLEAN *v.* MANAHAN.

The certificate of registry indorsed on a deed under 35 Geo. III. ch. 5, sec. 5, is *prima facie* evidence only of registry, and is not to be taken as incontrovertible evidence of the fact of registry, so as to exclude all proof to the contrary.

Ejectment for lands in the township of Kingston. The defendant obtained a verdict, at the last Midland District assizes, and a new trial has been moved for on the law and evidence, and for misdirection. Two questions were raised at the trial: one upon the effect of the Registry Act, 35 Geo. III., ch. 5, and the other upon the application of the statute, 27 Eliz. ch. 4, against fraudulent conveyances. The lessor of the plaintiff claims under a deed of bargain and sale made to him by Allan McLean, on the 21st June, 1830. The defendant claims under a deed made to him by the same Allan McLean, on the 4th June 1841, which was registered in the county register, on the 7th June, 1841. The deed to

(a) *Fortescue*, 341.

(b) 2 *Saund.* 83.

(c) 4 *T. R.* 585.

the lessor of the plaintiff was never in fact registered, that is, never transcribed into the books of the county registry, although there is indorsed on it a certificate of registry in the usual form, mentioning a certain folio and number of memorial, and the time of registry. In a page in the book of the county register there is entered in the margin, the following words, "No. 258, registered the seventh day of February, 1834, at the hour of ten o'clock of the forenoon, in Book L. on pages 363, 364. Memorial No. 258, signed N. T. McLean Dy. Register, Frontenac." No entry was made of this deed in the index, and the marginal note specified neither the parties to the deed, nor the land to which it related, so that it could afford no information to any party searching into the title. It was proved on the trial that no memorial of this conveyance remains filed among the papers of the office, nor was it shewn that there had ever been one in the office, though there was some evidence of such a memorial having been seen in the hands of a third party, but this was not until after the deed of the defendant had been registered. Upon these facts it was contended by the defendant, that his deed from Allan McLean was clearly entitled to prevail over the prior unregistered deed, made by the same grantor to the lessor of the plaintiff. The lessor of the plaintiff, on the other hand, argued that the certificate of registry indorsed on his deed should be taken as conclusive evidence of such a registry as it described; and if not, still he contended that defendant's case was not brought within the Registry Act, because it was not shewn that a patent had ever issued from the crown for the land. This latter objection the defendant met at the trial by contending that the lessor of the plaintiff, claiming himself under the same grantor, admitted his seisin, which could only have been by reason of a prior patent having issued to some one divesting the crown of the estate, and that his long possession, which was proved, would supply evidence of title, by raising the presumption of a grant from the crown. The defendant then contended that the conveyance to John McLean was voluntary, and therefore void, under the statute 29 Elizabeth, ch. 4, against a bona fide purchaser for value, which he claimed to be. The following were the facts in evidence on this point: Mr. Allan McLean is the father-in-law of the lessor of the plaintiff, John McLean. On the 21st June, 1830, he went to the lessor of the plaintiff, with a deed, ready prepared by himself,—he said he was in difficulty, and wished to make some arrangement of his property to secure it for his family; he made, about the same time, five other deeds of other portions of his property, two to one of his sons, and two to another son-in-law (McPherson). He spoke of apprehension of some proceedings being taken against him by the government, on account of a public contract, in which he was security for another of his sons. The property which he proposed to convey to the lessor of the plaintiff, was of great value, a consideration was expressed in the deed of £2,000, but nothing was in fact paid. The lessor of the plaintiff allowed the conveyance to be made to him, and gave to Allan McLean a bond, conditioned to pay him 1500*l.* in annual instalments of 500*l.* each. Since that time, however, Allan McLean has been suffered to remain, as before, in possession of the premises conveyed, which were of much greater value than 2000*l.* At the time of executing the deed and bond, a payment of 500*l.* on account of the 2000*l.* was pretended to be made, but it was merely

colourable, for it was proved that Allan McLean brought the 500*l.* with him, in bank bills, which he had borrowed for that purpose; and handing them over to John McLean, in the presence of a witness, took them back from him, enabling him thus to go through the form of making a payment when in truth he paid nothing. The same 500*l.* in bills, it seemed from the evidence, had been made to answer the same purpose in the other pretended transfers, or, at least, in some of them. With regard to those other transfers, however, it was proved, that after some time, the deeds were surrendered up by the pretended grantees, to Allan McLean, with whose possession of the property they had never interfered. In February, 1834, nothing having in the meantime been ever paid or demanded of John McLean under his bond, a note was addressed to him by Allan McLean, in the following terms: "I should feel obliged, if convenient, you would return my land papers by James, who goes down to your house to see William, who, he understands, is returned. Having acquired a considerable quantity of property since I made my will, it becomes necessary to new model it, particularly as the one in being was a very imperfect instrument. I have still a great deal of weakness about me, but am anxious my worldly affairs may be settled, and cannot arrange them finally without the papers you have. If not convenient to send the papers by James, be pleased to say when I can send for them." It was proved to have been clearly admitted by the lessor of the plaintiff he had no papers in his possession relating to the lands of Allan McLean, except the conveyance which had been made to him in February, 1830, and it is plain that he understood the note as a request that he would give up that deed, for he sent the following note in answer:

7th February, 1834.

Dear Sir,—Your note of yesterday, was, by James, handed to me at the office, by whom I intended to have replied, but he did not come down to the house with William, as I expected. I regret much to find that you still continue so very weak, and fearing that those surrounding you, who at present appear to enjoy the sunshine of your good pleasure, may take advantage thereof, to the prejudice of those who ought to be nearest and dearest to you, must, for the present, decline surrendering the paper alluded to.

I am, dear sir, &c.
(Signed) JOHN MCLEAN.

Allan McLean, Esq.

While things remained in this state, Allan McLean having sold to strangers some portions of the premises embraced in the deed, John McLean began actions of ejectment against the persons whom Allan McLean put in possession, finding, as he alleged, that it might prejudice his case in equity, if he allowed Allan McLean to exercise that kind of control over the property. In these actions of ejectment he recovered judgment, Allan McLean having no defence in law to set up against his own deed which was binding upon himself, no fraud in obtaining it being alleged, and in November, 1840, Allan McLean filed his bill in equity, setting forth in substance, that the deed was given by him, upon the tacit understanding that it should be surrendered whenever he should require it, that nothing had ever been paid for the land, that his faculties were impaired by ill health,

and unfit to dispose of his property,—that the pretended purchase was fraudulent and void; and he prayed that John McLean might be enjoined from proceeding in the actions of ejectment, that the deed should be set aside, and the property reconveyed to him, or, if sustained by the court, that John McLean should be obliged to pay the £2,000 and interest, &c. On the 24th March, 1842, this case came on to be heard in the Court of Chancery upon the bill and answer, and it was decreed, that John McLean held the lands conveyed by the deed as trustee for Allan McLean, that an account should be taken of the monies paid by John McLean, on account of the alleged purchase,—that the costs of the suit should be taxed to Allan McLean, and deducted from such monies, or paid to him, if no monies had been paid on account of the alleged purchase, that the deed should be given up, and the land reconveyed to Allan McLean, and the bond given up to be cancelled. This decree was appealed from, and on 20th February, 1843, it was reversed on the ground that there was no evidence of fraudulent imposition; that Allan McLean was shewn to be of sound mind and competent to dispose of his property; that he made the deed deliberately to answer a purpose of his own, well knowing what he was doing, having himself prepared the instruments, and shewing artifice and contrivance in the transaction, in which John McLean was merely an assenting party—that he could not in equity more than in law, revoke a deed so given at his pleasure, but, in the absence of fraud in obtaining the deed, he was bound by it; that it was, on the face of it, an absolute conveyance, and no such evidence was given of a trust as the law would allow to be received. It was, on these grounds, ordered, by the Court of Appeal, that the decree of the Court of Chancery should be reversed; that it should be referred to the Master, to take an account of what principal money and interest were due in respect of the £2,000 mentioned as the purchase money; that Allan McLean should be charged with the rents and profits received by him since the making of the deed, which should be deducted from the sum due for purchase money and interest, with other directions for carrying into effect such decree. It was proved, further, on the trial of this cause, that on the 4th July 1840, one Flanagan entered into a written agreement with Allan McLean to purchase from him a part of the premises contained in the deed, and which defendant now claims, and for which Flanagan was to pay £200; that he had not heard when he made this agreement, of the deed which had been made to John McLean (and of which there was no trace in the county register)—that he afterwards did hear of it, and went to consult the defendant upon it, who told him that his title would be good notwithstanding that deed, but that, being reluctant to engage in a law suit, he sold out to Manahan, the defendant, who gave him £25 for his bargain, Flanagan not having yet paid any thing to Allan McLean. The defendant having thus purchased Flanagan's right under the agreement, received a conveyance from Allan McLean, on the 4th June, 1841, for a consideration of £225 (50 acres of land). It was proved that defendant, since his purchase, has built on the land, and made valuable improvements on it; that he had paid to Allan McLean at the time of executing the deed £75 on account of the purchase money. The value of the piece thus purchased by defendant was differently estimated by different

witnesses on the trial ; one valued it at about £5 an acre, another thought it would be cheap at £8 an acre, and might be worth £20. At the trial the counsel for the plaintiff took three exceptions (besides those relating to the question of registry), first, that the deed to John McLean, cannot be treated as a voluntary conveyance under the 27 Eliz. ch. 4, because of the bond which had been given to secure £1,500 as part of the purchase money. Secondly, That Manahan, the defendant, had not shewn himself to be such a bona fide purchaser for value, as to entitle him to prevail over the deed to John McLean, even if it were voluntary. Thirdly, That whatever might have been the case at the time the deed to John McLean was given, yet that the decree in appeal, which was proved together with the bill and answer in the suit of Allan McLean *v.* John McLean, being compulsory upon John McLean, to pay the £2,000 as being the actual purchase money, and such decree being in accordance with one of the alternatives prayed for by Allan McLean in his bill; that the deed can no longer be treated as voluntary, for that a good consideration is now, at all events, supplied, and although *ex post facto*, it will avail to support the deed. The defendant, in this action, objected that the proceedings in equity could not affect Manahan, who was no party to them, and that his title could not be injured by a decree subsequently made in a suit between other parties. The trial was before the Chief Justice, and after giving the evidence fully to the jury, with such observations as it seemed to call for, he left it to them to find whether, in their opinion, the deed given to John McLean was voluntary, that is without any valuable consideration either paid, or bona fide agreed to be paid, and further, whether the defendant was himself a bona fide purchaser for a valuable consideration, telling them that mere inadequacy of price would not affect his right to be treated as a bona fide purchaser, nor his knowledge of the previous deed ; and with regard to the bond for 1500*l.*, he directed them that if they were satisfied that Allan McLean did really and bona fide take a bond from John McLean, for 1500*l.*, on account of the land conveyed, with no secret understanding that he was not to enforce it, then the deed was not voluntary ; but that if the taking the bond was, like passing the money, a mere colourable act, designed to give the appearance of a real sale, when in truth the understanding was that payment was never to be made upon it, and that the bond should be given back again whenever it should be desired, then, he thought, the deed should be held to be voluntary. The Chief Justice did not attach importance to the proceedings in equity as affecting the right between these parties. The jury found a verdict for the defendant, expressing themselves satisfied, when they brought it in, that the deed, made in 1830, to John McLean, was voluntary, and not upon any real consideration. A rule nisi having been obtained by Burns, to set the verdict aside, as above, for misdirection and on points taken at the trial, against this rule,

Hagarty shewed cause.—The deed, under which the lessor of the plaintiff claims, cannot be considered as registered according to the provisions of the Upper Canada Registry Act. The certificate indorsed, is *prima facie*, not conclusive evidence of registration. The case of Doe Russell *v.* Gillett, in this court, Michaelmas, 3rd Vic., cannot apply where none of the requisites of the registry act are complied with. The

English Act, for the North Riding of York, contains a similar clause, as to the force of the registrar's certificate ; yet the English cases prove that such a pretended registration, as is set up in this case, would be wholly void.(a) A mistake of a letter in a name has been held fatal in registering a judgment.(b) It is contended, that the defendant must, under the second section of our registry act, shew that a patent from the crown must have issued, to avail himself of the registry laws. The plaintiff shews a deed to himself in fee. He cannot deny that he holds in fee, if at all, and the court must, in such a case, presume a grant from the crown, the original owner of all the land in the province ; besides, in the lessor of the plaintiff's deed, it is most probably recited that "the original grant from the crown" issued. As to the deed in question being void, under 27th Eliz., against subsequent purchasers for value, there can be no doubt of its being purely voluntary : a fraud upon creditors was, at all events, contemplated, and the consideration alleged is as wholly fictitious. (*Hagarty* referred to many facts appearing in the evidence). If the deed be voluntary, the law infers fraud (c). Actual fraud is not necessary (d). As to the alleged inadequacy of price given by the defendant Manahan, the rule, as laid down by Sugden, V. & P. 3—281, is, that "it must be so small as to be palpably fraudulent." Per Lord Bathurst, the question is not "Is the consideration *adequate*, but is it *valuable*?" (e) The rule is also laid down, that "whatever consideration is sufficient to support an original settlement, is sufficient to avoid a prior voluntary one."(f)

Ramsay followed on the same side.

Sullivan and *Burns*, in support of the rule.—The first question for consideration is, whether the conveyance to the lessor of the plaintiff was voluntary. On the face of it, it does not appear to be so ; in form it is a deed of bargain and sale, and the consideration is not only expressed in the deed, but the sum of 500*l.* is proved to have been paid down at the time, and a bond for 1500*l.* given. The amount of the consideration is never a question in these cases ; neither, can the intention with which this payment and security was given between the present parties. It is suggested, that the elder McLean was in some difficulty, or rather, that he apprehended some difficulty, on account of his having become security ; but though as between his assignee of the land, and any creditor, the deed may be impeached as fraudulent, yet, in this case, where there absolutely is no proof of there being any creditor, and where the tenant in possession does not pretend to be a creditor, it is not competent to him to set up that

(a) Dixon on Titles, 755; Riggs on Registration; 3 Sugden's V. & P. 10th Edit. 351; *Jack v. Armstrong*, 1 Huds. & Bro. 727; *Hobhouse v. Hamilton* 1 Sch. & Lefroy, 207; *Latouche v. Dunsany*, 1 Sch. & Lef. 158; *Eyre v. Dolphin*, 2 B. & B. 299.

(b) *Sale v. Compton*, 1 Wils; 2 Strange, *Bushell v. Bushel*, 1 Sch. & Lef. 90.

(c) 8 T. R. 528. *Doe Otley v. Manning*, 9 East. 1 Mad. C. P. 271.

(d) Twyne's Case, 1 Smith's Leading Cases & Notes; *Goodright v. Moses*, 2 Sir W. Bl. Rep. 1019; *Evelyn v. Templar*, 2 Bro. Ch. Cases, 148; 8 Dow. 60.

(e) *Upton v. Bussell*, Cro. Eliz. 444; *Doe Parry v. James*, 16 East. 212; *Bullock v. Sadler*, Ambler, 767.

(f) 2 Flintoff on Real Property, 516; *Doe Watson v. Routledge*, Cowp. 712; *Gwynne v. Heaton*, 1 Bro. C. C.; *Pulverstoft v. Pulverstoft*, 18 Vesey, 90; *Hill v. Bishop of Exeter*, 2 Taunt. 69; Co. Lit. 204, a; Bull N. P. 173.

the payment was a pretended one, and the security intended as colourable. This conveyance was, perhaps, liable to be impeached as a fraudulent conveyance by creditors; but there being no creditors, the grantee himself is bound by his receipt, by his acceptance of the bond; with whatever intention that bond was given between the parties to the conveyance, if it was not at first intended to be a real security, it became so at the will of the obligee; and being so, the conveyance can by no process of reasoning be deemed voluntary. In *Jones v. March* (*a*), a settlement after marriage of 100*l.* per annum was declared good, though all it had to support it was a receipt on the back of the deed for 100*l.* In *Brown v. Jones* (*b*), an agreement to pay money was held to sustain a settlement made after marriage, though the person who made it was a bankrupt at the time it was impeached. In *Colville v. Parker* (*c*), which was a case of information on the stat. of Elizabeth, secrecy in a conveyance was held not to make it fraudulent. A settlement purely *voluntary*, by one not indebted at the time, is good as against subsequent creditors, *Holloway v. Millund* (*d*), *Curtis v. Price* (*e*); and reversing the case, and supposing the conveyance not voluntary, but made for a purpose said to be fraudulent, and only impeachable on the ground of intended fraud, yet operating as no fraud, and no person appearing in the character of a creditor against whom it could have such operation, shall it be said that a subsequent purchaser is competent to treat the deed as voluntary. The alleged intention was to defeat creditors, this shews the advantage of the deed; valuable inducement was moving to the grantor, not from him to the grantee, as in the case of a voluntary conveyance; how then can this be declared a voluntary deed, one without consideration, now that it is not impeached by creditors, none of them appearing to exist. The judgment of Lord Ellenborough, in the leading case, *Doe Ottley v. Manning*, (*f*) in which all the authorities are carefully examined, is not by any means hostile to this argument. His lordship says that, in most, if not in all, the cases cited by the defendant, there were reciprocal considerations, some benefit acquired by persons which might fall under the denomination of a valuable consideration. So there was in this case. Taking the worst view of the case, the grantor for his own purpose, sought to convey the land; he gave the conveyance and the transaction all the appearance of a substantial consideration; taking away the imputed fraud upon creditors, it was at worst a conveyance with a parol understanding for revocation, an understanding which the grantor could not himself make use of, and which there is nothing in the statute of Elizabeth against voluntary conveyances which would enable his privy in estate to set up. I am aware that it has been settled, though reluctantly, by 18 Ves. 84, 111, and 2 B. & C. 148; and though the equity of the doctrine is much questioned by Fonblanche; (*g*) but still it is settled, that even before any third person has acquired any interest in the property voluntarily settled, and where the matter rests between the grantor and the grantee, the latter has no equity to prevent the former from defeating the grant by a sale of the estate. But nevertheless, to impeach a settlement as void, for fraud, under

(*a*) Ca. Temp. Talbot.(*b*) 1 Atk. 188.(*c*) Cro. Jac. 158.(*d*) 1 Mod. 414.(*e*) 12 Ves. Jun. 103.(*f*) 9 East. 71.(*g*) On Equity, 282.

27 Elizabeth, the grantor must be proved to be in debt at the time, and the extent of his insolvency must be shewn, *Lush v. Wilkinson*; (a) ever so small a consideration is sufficient to prevent a deed from being voluntary, but a small and inadequate consideration would in itself be proof of fraud as against creditors. The two statutes of Elizabeth should therefore not be confounded; a deed is not voluntary because of a parol understanding to revoke, neither is it voluntary because it would have been fraudulent as against creditors; none but creditors could set up such an understanding as fraudulent; and as against subsequent purchasers, it is not voluntary either in form or in fact, and cannot be so in law. But secondly, it is a well understood doctrine, that a deed once voluntary, may be made good by a subsequent consideration; and a person who purchases, *pendente lite*, is subject to all the consequences of the suit. In this case, McLean the grantor prayed relief in the Court of Chancery, that this bond might be secured upon the property; that relief was afterwards granted by the Court of Appeals. Here there is a subsequent unimpeachable consideration which the purchaser is decreed to pay by the highest court in the land; pending the litigation the present defendant chose to purchase; he knew that his grantor was seeking security for a portion of the consideration for this deed, and he is affected by that security being decreed; if this were not so, the monstrous injustice would be done, of one court making a purchaser pay a valuable consideration for a conveyance, which another court declares voluntary and without any consideration. (b) With respect to the question of registry, it is not of so much importance, though it may decide this case in law; yet, as Manahan can be proved to be a purchaser with notice, the plaintiff must prevail in equity. Nevertheless, the case *Doe Russell v. Gillet*, decided in this court, would seem conclusive upon the point, that the certificate of registry on the back of the deed, is unimpeachable evidence of its registry.

ROBINSON, C. J.—Upon the question of registry, we are of opinion that the provision in the 5th clause of the 35th Geo. III. ch. 5, that the certificate indorsed by the registrar or his deputy on the deed “*shall be taken and allowed as evidence of the registry in all courts of record whatsoever*,” makes such certificate *prima facie* evidence only of the registry, with a view merely to sufficiency and facility of proof in the first instance; but that such certificate is not to be taken as incontrovertible evidence of the fact, so as to exclude all proof of the contrary. If it were to be taken as incontrovertible evidence, then all people would hold their estates at the mercy of a registrar, who could give effect to deeds at his pleasure, by giving false certificates of registry never made. It would be idle to say that the 1000*l.* security given by him, and the chance of his solvency, must be looked to for indemnity for injuries which he might occasion, not by his negligence merely, but by his false statement of what had never happened. The intention of the statute was to enable all persons to know when they were safe by inspecting the register, and the provision made in the act will insure that object in regard to registered titles, where the requisites of the act have been substantially complied with; but in this case, there was no entry whatever of the conveyance to John McLean,

(a) 5 Ves. Junr. 384.

(b) Story's Equity, pl. 284, 287, 149; 1 Sid. 133.

in the index; no actual record of it in any book in the office; no memorial filed in the office, nothing whatever by which a subsequent purchaser could have gained any knowledge of that deed. It would be a monstrous construction of the act that would allow a person who had purchased subsequently, under such circumstances, to be defeated by a false certificate indorsed on the deed, of which no trace whatever could be found in the register office, such deed having been always, as we may suppose, in the private custody of the grantee; and, in this case, it would be more unjust still, from the fact that the registrar of the county who gave the first deed, and ought to have registered it, is the same person who made the subsequent conveyance, which would be thus made void by means of the untrue certificate. The second clause of the act makes the validity of a conveyance depend on its being *actually registered* before any subsequent deed, not on its being merely *certified* to be registered. There are many parallel cases in the law, where certificates are made *evidence of the fact*, as in this case, but where the most intolerable injustice and confusion would be created, by holding that they were conclusive evidence; for instance, certificates of marriage being solemnized, certificates of convictions for felony, which our statutes make evidence, and many others that might be mentioned. There may be hardship undoubtedly to a person claiming under the first deed, when he finds himself deceived by the registrar's certificate, and, believing his deed to have been registered, is afterwards defeated in his title by the actual registration of a subsequent deed; but admitting that in such case, the grantees in the two deeds are equally innocent, surely that one should prevail who has the truth on his side, and not he who has the mere deceptive appearance of a fact which had no existence. The legislature, by passing the registry act, relieved parties (as to titles once registered) from the necessity of inquiring about transfers anywhere but in the registrar's books; and it would be laying a snare for people, if, after holding out (which the statute does), the assurance that a purchaser need trouble himself about no transfer or incumbrance, which he does not find entered there, the act should be so construed as to subject his title to be defeated by an untrue certificate, indorsed upon a separate paper, in the custody of an individual, and which he had no means of knowing. If the legislature had thought it right to make the certificate conclusive evidence, that is, undeniable, absolute evidence of the fact, they should have done so in terms; we cannot hold it to be so, when the statute merely says it shall be *received as evidence*. In *Kennedy v. Cope*, Doug. 56, a certificate of enrolment is determined to be evidence, though not made such by the statute; in other words, it was considered evidence that might be received, as the declaration of a public officer entrusted to do the act. Here the statute removes any doubt on that point, by expressly enacting that it shall be evidence, but it goes no further. Nothing but an express provision to that effect by the legislature, would enable us to hold that a certificate, to which a man is himself no party, should be binding upon him, where even the most solemn record, finding the same fact by verdict of a jury, and judgment of a court, would not be conclusive upon him, unless he was party to the record, and then only upon grounds of public policy, that there may be a limit to litigation.(a) So far indeed from the

(a) 1 Stark. Ev. 253.

certificate being conclusive evidence of registry, when there has been no registry whatever, it would not avail when there has been an actual registry, unless such registry were made according to the act, that is, substantially in conformity to it. This point is clear upon authority, as well as in reason.—Sugden's Vendors, vol. 3, 351, 355: "When the memorial does not comply" (Mr. Sugden says) "with the directions of the act, the person claiming under the deed defectively registered, cannot insist on the benefit of the statute against a subsequent purchaser without notice, (which must be said in reference to equity only), whose conveyance is duly registered." All the substantial requisites of the memorial must of course come within the terms of this proposition.(a) So also in speaking of some of the evils arising from the registry acts, Mr. Sugden says: "Great numbers of instruments have been registered in a manner directly contrary to the provisions of the acts, and therefore, ineffectually in law. The slightest mistake may be fatal. If a man's name be Crompton, and it is written 'Compton' in the register, he would lose his estate, in competition with another though later claimant, in whose registry there was no error." This principle, however, has been modified by reason, in its application in the few cases that have arisen; as in the case reported in 1 Sch. & Lef. 157, and in *Wyatt v. Barwell*, 19 Ves. 438, where the name of the grantee was spelt Soden in the deed, and Seden in the registration. Sir William Grant says, "As to the mistake of a letter in the name of the grantee, I do not see in what way it could operate to disappoint any object of the act, when the substance of the transaction is admitted to be correctly set forth. If search were to be made, by an index of names of persons, a mistake of this kind might be of some importance, but the calendar that is to be kept at the register office is of the parishes, places and townships, in which the lands lie." In the case before us, the register shewed nothing in the books, or in any index, that related to this conveyance, either in regard to the parties to it, or the land included in it, and the case is, therefore, too plain to admit of any doubt. If the registrar could supply all, by an untrue certificate indorsed upon a deed, of which the world may know nothing, the act would be opening the door to much more flagrant mischiefs than any it could prevent. But it was objected at the trial, that even if it be granted that we must look upon the deed to the lessor of the plaintiff as an unregistered deed, notwithstanding the registrar's certificate indorsed upon it, still the defendant could not claim to have his subsequent deed preferred to it, under the registry act, because it was not shewn that the land in question had ever been granted by the crown by letters patent; and that it was only to such lands as the crown had granted by patent, that the provisions of the registry act applied. No patent for Lot No. 3, or any part of it, was produced at the trial, nor any exemplification of such a patent. The defendant's counsel insisted that we must infer, as against the lessor of the plaintiff, that a patent had issued, because, by taking his deed in 1830, he admitted Allan McLean to be seized, which he could not have been, if the crown had not divested itself of the estate by letters patent. And he contended further, that the long possession which Allan McLean was

(a) *Tack v. Armstrong*, 1 Huds. & Bro. 727.

proved to have had of the land, led fairly to the presumption of a grant. I inquired, I think, at the trial, as we afterwards inquired during the argument in term, whether the deed to John McLean did not contain a reference to letters patent for the description of the land, or for the restrictions and reservations contained in the grant from the crown, as is very common in deeds of conveyance in this country. It was stated that it did not; but it turns out, that in this respect the counsel were mistaken, for, on examining the deed, they have discovered, and have since communicated to us the fact, that that deed (which was in evidence upon the trial,) does contain a mention of letters patent, and in several places, in the granting part of the deed, in describing the premises, and in the covenant of warranty; in the former it is connected with other parcels of land granted, and not with any part of Lot No. 3, which is the land now in question; at least it cannot be connected with this land by fair grammatical construction. But in the covenant at the end of the deed, it is otherwise; the covenant runs thus: "And that the said Allan McLean, and his heirs, will warrant and defend the same, (extending to all the lands conveyed by the deed), to the said John McLean, his heirs and assigns, against the lawful claims of all persons whatever, *subject, however, to the reservations and conditions contained in the original grant thereof from the crown;*" (that is, the grant from the crown of all the lands conveyed). This puts an end, in our opinion, to any difficulty for want of its appearing that a patent had issued, for the lessor of the plaintiff, being a party to that indenture, and claiming under it, must be taken to have recognized the issuing of a patent for all the lands to which this covenant extends; in other words, to all the lands in the deed. Whether he could be admitted to shew the contrary is a question we need not enter into; we consider that, upon the face of the indenture between the parties, it sufficiently appears for the purpose of the registry act, at least until the contrary is shewn, that this is land upon which the law of registry does, by the terms of the statute, attach. And, even in the absence of this proof, we consider that we ought not to have set aside this verdict for the defendant, and which he would be clearly entitled to under the registry law, independently of any other question in the case, without some ground being laid before us, for believing that no patent had been issued. I did not reserve any point at the trial, but relied, in favour of the defendant, on the point of registry, leaving to the plaintiff to move for misdirection, in term, if the event of the trial should require it. I so ruled for the time, because I was clear that the deed of June, 1830, could not be regarded as a registered deed; and, for reasons which need not now be stated, I was inclined, though not conclusively, to the opinion that the defendant could, without producing letters patent, claim the advantage of his registry. If we were still without further evidence of the existence of a patent for the lands in question, than the court was considered to be in possession of at the time of the trial, and if the direction on the point of registry were now complained of as erroneous, and a new trial moved for solely on that ground, we ought not, as there was no point reserved, to set aside the verdict in consequence of any opinion we might have formed upon that question, unless for the purpose of advancing the ends of justice; and we should hardly have granted a new trial in that case, without putting it to the lessor of the plaintiff to say whether the fact of a patent

having been long ago issued, was really intended to be disputed ; because, if it could not be denied, and could be made perfectly clear on another trial, it would have been only harassing parties with delay and expense, to no purpose, to go down to a new trial upon this point of registry, if the result upon what could then be undoubtedly shewn, must be the same as that which the jury had already arrived at. But taking the case as it now stands, with the additional fact of the reference to the patent in the very deed under which the lessor of the plaintiff claims, we can have no doubt that the defendant must be allowed to retain his verdict, upon the single ground of the prior registry of his deed, for it was clearly shewn at the trial, that the title to this land was what is called a registered title, that is, that the registry contained one or more registered deeds respecting it, before the deed to the lessor of the plaintiff was made ; and it cannot be contended, and indeed has not been, that the fact of notice to the defendant of the prior deed can affect his case at law. We were prepared to express our opinions upon the necessity, under the registry act, that a patent should have issued, but this has become now unnecessary. The opinions we have already expressed make an end of the case, and it is unnecessary to go into any other question that has been raised. I did, however, at the trial, notwithstanding my ruling in favour of the defendant on the point of registry, request the jury to pronounce their opinions upon the evidence given, on both sides, for the purpose of shewing whether the deed to John McLean is, or is not, to be treated as a voluntary deed. I knew, from what had been before us on other occasions, that the character of that transaction was important to be settled, as property of large value was involved, and as the case might turn out, upon mature consideration, not to be with the defendant upon the register act, it might then be found to be material that it should be ascertained what conclusion the jury, after hearing all the evidence produced on this occasion, had come to, upon the whole facts of the case. As to the deed being voluntary, on the first ground taken at the trial, that a deed cannot be held voluntary under the 27 Eliz., unless it appear on the face of it to be a mere deed of gift, there is certainly nothing in it. The statute would have had but little effect in preventing the mischiefs which it recites, if the mere inserting a pecuniary consideration in the deed were to be held evidence of the fact; the statute has never been so construed. The second point, namely, that the defendant did not shew himself to be a bona fide purchaser for value, it is of no moment, in any sense, to discuss, because it can affect only this action, and the defendant's right to retain his verdict on other grounds, is acknowledged by us. If the case had turned on the statute 27 Eliz., however, it would have been found free from difficulty on that point. The third point presents more ground for argument. It was contended that the statute 27 Eliz. ch. 4, applied to those deeds only which were made as purely voluntary gifts, and not to transactions like the present where there was reason for concluding that the grantor was actuated by the motive of defeating the claim of a creditor, or desired at all events to make the arrangement for some purpose of his own, whether commendable or not; and that, in the latter cases, though the deed might be void under the 13 Eliz., as being fraudulent against creditors, and when impeached by a creditor, yet it did not come under the statute against voluntary conveyances. I am persuaded

there is no force in that argument, that is, when there is an entire absence of valuable consideration, as between the grantor and grantee. If it were to hold, we should find it decided that the same conveyance could not be held to be at the same time invalid under the two statutes, 13 and 27 Eliz.; but I take it to be clear, and well established, that it may. "A conveyance for payment of debts generally," Mr. Sugden says, "to which no creditor is a party, nor any particular debts expressed, is a fraudulent conveyance within the statute (27 Eliz.), against a subsequent purchaser for valuable consideration" (a). If the deed, in this case, had been made purely as an act of favour, and with no other motive than benevolence, then it would have been a plain case of voluntary gift, under the statute. If the grantor, meaning to give his lands away, had this reason for it, that he would rather give them to a relative or friend for nothing, than that they should remain in his hands liable to be seized for his debts, or liable to claims which he apprehended, though he might not acknowledge them, the deed would be not the less voluntary, though this additional motive was superadded, for *voluntary* means only, as used in the statute—a conveyance which has no consideration of legal value to support it. Indeed, Lord Mansfield was inclined to give countenance to the dictum, that to make a voluntary settlement void under the 27 Eliz., against a subsequent purchaser, it must be covinous and fraudulent, as well as voluntary. But, in this case, there was a bond given by the grantee to the grantor, at the time of execution. I told the jury, if that was given bona fide, with no secret understanding that it was never to be enforced, and not meaning to give the transaction the appearance of reality, they should not find the conveyance voluntary, though the sum was much below the value. The jury found the deed voluntary, as being supported by no valuable consideration; by which I consider them to have determined that the making the bond was (like the passing of the money) merely colourable; and in point of fact, that was, I think, the natural conclusion to come to, from several circumstances, and from the whole complexion of the case. Then, taking the transaction as things stood at the time, and without reference to subsequent circumstances, the question is, whether it would be right to hold that the giving the bond signified nothing unless it was given in good faith, with the intention that it should be binding, and with no secret understanding that the papers were to be given up whenever Allan McLean should choose, as they were in fact by the other members of his family, to whom he made similar deeds. The bond was left in Allan McLean's possession; he could sue upon it, at any time, and recover, because the obligee could not be allowed at law to set up as a defence that the transaction was a mere colourable contrivance. Could, therefore, John McLean be allowed to set up the bond given by him as a *real consideration*, in a contest between himself and a stranger, upon the title, because Allan McLean had it in his power to do that which it was agreed and understood between them he was not to do, deriving his right to violate the understanding from a consideration which applies only to the parties themselves, and not to a stranger purchasing afterwards for value?

Then this other question arises: If the deed, notwithstanding the bond being given, must be treated as voluntary, under the circumstances attending the giving of the bond, what is the effect of the decree in equity, between the grantor and grantees, made on appeal in February, 1844, treating John McLean as the owner of the property, because Allan McLean was bound by his deed, however voluntary it might be; and compelling John McLean, in consequence, to pay up the bond which he had given, holding him, of course, as much bound by his bond as the other was by his deed, in any litigation between themselves? This decree was made long after the defendant took his deed, which was in June, 1841; but in a suit, in which the bill had been filed, in November, 1840, Flanagan, from whom the defendant purchased, having contracted to purchase the estate from Allan McLean in July, 1840, and having sold it to defendant between the filing of the bill in November, 1840, and July, 1841, when defendant got his deed from Allan McLean, as the assignee of Flanagan. This question involves several considerations, upon which I am prepared to express an opinion, though not free from doubt in one point; but, though the lessor of the plaintiff, and perhaps Allan McLean, who is not a party to this suit, might desire to know our opinion on the effect of the bond and the decree, as it would affect the title of parties to other estates embraced in the deed of June, 1830, we shall act more correctly, I think, in abstaining from determining these points in a cause in which they have become immaterial. Other persons, whose estates may remain to be affected by our judgment on these points, will have a right to be heard upon them, and it is better that we should leave ourselves free to determine them, after hearing their arguments, without being embarrassed by any extrajudicial opinions which we might now express. Our judgment, discharging this rule for a new trial, proceeds exclusively on the ground that the defendant has, by the registry of his subsequent deed, obtained clearly a prior right over the lessor of the plaintiff, claiming under his own unregistered deed.

JONES, J.—For the defendant it is contended, first, that the deed from Allan McLean to the lessor of the plaintiff, was not duly registered, and consequently inoperative as against the subsequent deed to the defendant duly registered. Secondly, that the deed to the lessor of the plaintiff was a voluntary conveyance, and therefore void as against the deed to the defendant, a subsequent bona fide purchaser for a valuable consideration. As to the first point, I am of opinion, that the deed from Allan McLean to John McLean was not duly registered. A certificate of registry, in the usual form, was indorsed upon the deed. It was proved, at the trial, that no memorial of the deed was to be found in the registry office, nor was there any entry thereof in the books of the office, as required; but, at the place where the entry of the memorial should appear in the book, according to the certificate of registration upon the deed, there is a blank leaf, with a memorandum in the margin, as follows: "No. 258 registered the 7th day of February, 1834, at the hour of 10 o'clock in the forenoon, in book L., in pages 363, 364, Memorial No. 258. Signed, N. McLean, Deputy Registrar, Frontenac." The names of the parties to the deed do not appear, nor any description of the land contained in the deed, nor is there any entry in the index. When we consider the object for which a

registration of deeds is authorised, namely, as a notice to subsequent purchasers, and as a protection against prior secret conveyances, this cannot be regarded as a registration; for no information whatever of the nature intended to be afforded by the registry act, could be obtained by a search in the office. There was no original memorial remaining in the office, nor copy entered in the books, there was no entry or memorandum of the land intended to be conveyed, nor the names of any parties, nor any single circumstance affecting the land in question. It is contended for the plaintiff, that the certificate of the Registrar on the back of the deed, is conclusive evidence of the registration according to the statute, and, like a record, is incapable of contradiction.(a) The certificate is *prima facie* evidence of registration, and must be regarded as conclusive evidence that all the formalities required to authorise an officer to register a deed had been duly observed. The facts of the case in *Doe Russell v. Gillett*, decided in this court, and referred to in argument, as establishing that in a case like the present the certificate of registration is conclusive, are these: the lessor of the plaintiff proved the deed under which he claimed, and relied upon the certificate of the registrar endorsed on the back, as a proof of the registry; the defendant proved, by the production of the original memorial from the office, that no certificate was endorsed upon it as required by the 35th Geo. III. ch. 5, sec. 4, shewing that the execution of the deed and memorial had been proved, in the manner required by the act, and contended there was no legal registration. A verdict was taken for the defendant, subject to the opinion of this court upon that point. After argument, it was decided that the certificate of the officer on the back of the deed, must be regarded as conclusive evidence that the execution of the deed and memorial had been duly proved, and that the production of the memorial to shew that the direction in the statute with regard to the indorsation of a certificate thereon, could not be held to impeach the certificate of registration indorsed upon the back of the deed. Admitting the decision in *Doe Russell v. Gillett* to be correct, it does not go the length contended for in this case. The objection, that the registry of the deed to the defendant did not affect the deed to the lessor of the plaintiff, because it was not proved that any patent from the crown office had issued, is answered by the circumstance, that the lessor of the plaintiff took a deed in fee from Allan McLean, and that in all the deeds it appears that a patent had issued. From the evidence reported, it appears, and the jury also found, that Allan McLean conveyed the lands in question, and much more of great value, to John McLean, for the purpose of defrauding his creditors: that he gave to John McLean the 500*l.* apparently paid to him as part of the consideration for the pretended purchase, and took a bond for 1500*l.* the remainder of the consideration money mentioned in the deed, the payment of which, it was intended, should not be enforced; the object being to make the transaction appear *bonâ fide*. This would be a conveyance void as against creditors, by the 13th Eliz. c. 5, and I am of opinion, that it is void, also, under the statute 27 Eliz. c. 4, against a *bonâ fide* purchaser for a valuable consideration. It is not a mere voluntary settlement, or a deed of gift, which

(a) 3 Price 495; 1 Doug. 56; 3 Taunt. 544.

is to be regarded as void under the last mentioned statute. If the mere insertion of a consideration, which was not, nor was ever intended to be paid, would take from a deed the character of a voluntary conveyance, the statute would become a dead letter. In the case of *Doe Steel v. McGill*,^(a) in this court, a deed given by a third person, on the face of it a deed of bargain and sale, with a valuable consideration expressed, when none was paid or intended to be paid, was held to be voluntary; and if so, this, which expresses a consideration, no part of which was in fact paid, nor intended to be paid, must also be so regarded. And Lord Mansfield says, in *Doe v. Routledge*, Cowp. 710, "The title of the statute is 'against covinous and fraudulent conveyance,' where *nominally* one man *passes*, and where *nominally* his estate is *conveyed* to another; but where in fact it is agreed that the grantor shall keep it to his own use, and so to answer other purposes of fraud." When a contract is entered into for fraudulent or illegal purposes, the law refuses its aid to enable either party to disturb such parts of it as have been executed, or carried into effect; and as to such parts as remain executory, it will not compel the contractor to perform his engagements or pay damages for non-performance; thus, in both cases, leaving the parties where it finds them. The fact that the payment of the bond by John McLean may be enforced at law by Allan McLean, or that the deed, as between themselves, conveyed the estate to John, cannot affect the question. The transaction was fraudulent, and the deed was void, as against creditors, having been made expressly to defeat their claims. Can it be regarded as valid against a subsequent bona fide purchase for valuable consideration, because this fraudulent intention was expressly proved; when it would be regarded as fraudulent under the statute of 27 Eliz., without express proof of any fraudulent intention, when no consideration was paid or intended to be paid? That the transaction was fraudulent, without such intention to defeat creditors, is established by the case of *Doe Bothell v. Martyr*.^(b) There one William Bothell, who had made a voluntary settlement of the land in question, subsequently conveyed it to Thomas Bothewell, for 450*l.* for which he took a bond, and Thomas Bothewell entered into possession under the deed. The bond was never paid by Thomas Bothewell, who was no relation to Bothell, and who was in mean circumstances. This was ruled to be a fraudulent transaction; but a purchaser under Thomas Bothewell, for valuable consideration, without notice, was protected. The knowledge, however, of a purchaser for a valuable consideration, of a prior voluntary settlement or conveyance, does not affect his title in law,^(c) because it is a conveyance made void by statute. I am, therefore, of opinion, that the deed from Allan McLean to John McLean is void, as a voluntary conveyance, against the defendant, a subsequent bona fide purchaser for a valuable consideration, under the statute 27th Eliz., and that on this ground, the plaintiff is not entitled to recover.

HAGERMAN, J.—I concur in the opinion that the certificate of registry is *prima facie* evidence of due registration only, and that it may be rebutted by evidence of facts shewing it to be fraudulent or void, from any cause. In the case before us, the conveyance by Allan McLean to

(a) Michl. Term, 6 Vic.

(c) Cowper, 710.

(b) 1 N. R. 332.

the lessor of the plaintiff never was registered at all; the certificate, therefore, was wilfully false and fraudulent. I also agree in the judgment just pronounced by his lordship the Chief Justice, and my brother Jones, that, inasmuch as the patent from the crown to the land in dispute is referred to, in the conveyance mentioned, and therein admitted to have issued, it was unnecessary to give further evidence of that fact at the trial; that therefore this court, *as a court of law*, must give effect to the registered title of the defendant, who also claims under Allan McLean; and that, upon these grounds, this verdict ought not to be disturbed. As respects the other, and, upon the general question, more important point, viz., whether the conveyance by Allan McLean to John McLean, is to be deemed a voluntary conveyance without consideration, and therefore void as against subsequent purchasers for value; although I have formed an opinion, it is unnecessary to express it at present; should the question however, require judicial decision hereafter, there are two facts that cannot fail to have much weight with the court: first, that the bond from John McLean was executed simultaneously with the conveyance by the latter to the former, and that it was taken away and is still retained by Allan McLean; and secondly, that by the judgment of the Court of Appeal, Allan McLean has a lien upon the land so conveyed by him for 2000*l.*, as the consideration for such conveyance, and that the bond for 1500*l.* forms a part of that sum.

Judgment for defendant.

ROSS AND MCLEOD v. MCKINDSAY.

Semble.—A notarial protest from Lower Canada, certified by the notary as a true copy from his notarial book, is sufficient without any notarial seal. Where in assumpsit for goods sold, the defendant pleaded that he had made his note to the plaintiffs for part, and paid the note when due, and the plaintiffs replied that when the note became due the defendant only paid part to wit, 93*l.* in money, and gave an acceptance on A. B. for the residue, 50*l.*, which was dishonoured when due, of which due notice was given, concluding with a special traverse, and the defendant reiterated the defence in the plea: Held, that he could not on the trial shew that the plaintiffs had made the 50*l.* acceptance their own through laches, but under the pleadings was bound to shew *actual payment*.

The plaintiffs sue in assumpsit for goods sold and delivered, and on an account stated. The defendant, as to the greater part of the demand, pleads non assumpsit; and, as to 143*l.* 10*s.* 3*d.*, residue of the monies in the declaration mentioned, he pleads, that before action brought, he made his promissory note promising to pay to the plaintiffs or order, in six months, 143*l.* 10*s.* 3*d.*, which period had elapsed before bringing this suit; that he delivered the said note to the plaintiffs, who then accepted and received the same in full payment, satisfaction and discharge of the said sum of 143*l.* 10*s.* 3*d.*, parcel of the monies in the said declaration mentioned, and of the premises in respect thereof; and he avers that the said note, after it became due, and before this action brought, viz. on &c., was fully paid by the defendant to the plaintiffs. The plaintiffs reply to this second plea, that the said note was delivered by the defendant to the plaintiffs *for and on account of* the said sum of 143*l.* 10*s.* 3*d.*, parcel of &c., and that it was agreed between the parties, that if the sum mentioned

in the note should be paid in full, on the same becoming due, it should be received in full discharge and satisfaction of the said 14*l.* 10*s.* 3*d.*, parcel of the monies &c.; that when the note became due, to wit on &c., the defendant only paid a part of the said sum, viz., 9*l.* 10*s.* 3*d.*, and for the remaining 50*l.* gave the plaintiffs a bill of one Biggar, upon Forsyth, McGill & Co., for 50*l.*, which bill was accepted, but was not paid when due; and being duly presented before the commencement of this action, was dishonoured by non-payment; that notice thereof was given to Biggar; and that the bill still remains in the plaintiff's hands unpaid; with a special traverse that the note was accepted by the plaintiffs in full satisfaction and discharge of the said sum of 14*l.* 10*s.* 3*d.*, as in the plea mentioned, and was fully paid by the defendant before the commencement of this suit, and concludes to the country. The defendant joins issue on this replication. It was proved at the trial, that it was expressly understood that the 50*l.* bill should be made good by the defendant, if not paid by the acceptors; that the bill was returned dishonoured, and that the defendant was immediately notified of the fact. The defendant's counsel objected that a paper produced was only a copy of the protest, and not the protest itself, and was therefore no evidence of non-payment, and therefore it did not appear that the defendant had notice of the dishonour, or that notice was given to Biggar; and that for all that appears, the money may have been lost by the laches of the plaintiffs. It appeared to the learned judge on the trial, that the only issue on the pleadings was upon the fact of the bill being paid, or not; of which the burthen of proof lay on the defendant; and, that if the defendant meant to affirm that the plaintiffs had made the bill their own by their laches, he should have pleaded that in answer to the replication. With respect to the proof of protest, the paper produced had no notarial seal, but professed to bear the real signature of the notary, certifying that it was a true copy of the original remaining of record in his office; such proof of protest in Lower Canada as has been usually given on other trials. The jury found a verdict for the plaintiffs.

Hagarty, for the defendant, obtained a rule nisi to enter a nonsuit, pursuant to leave reserved, or for a new trial, without costs, on the ground of misdirection, and because the verdict is contrary to law and evidence.

Blake shewed cause.

ROBINSON, C. J.—With regard to the sufficiency of proof of protest, I believe the evidence given in this case was that which is usually given of protests made in Lower Canada, where the act of protest itself is recorded in the official book or registry of the notary, and is preserved there, and a copy of the entry in that book, attested by the signature of the notary, is the proof of the act supplied by him to the parties. I have frequently seen such attested copies from the notary's book, under his hand, and without his seal, received in evidence, and I do not remember any question being raised about it. In an anonymous case in 12 Mod. 345, a protest being produced "attested by" a notary public, it was insisted that the plaintiff should prove the protest, or give some account how he came by it; but Holt, C. J., said "that would destroy commerce and public transactions of this nature." The words "attested by" in this case, do not import any thing more than a declaration of authenticity, under the hand of the notary: in other words, a certificate. Mr. Justice Bayley, quoting

this case, says, "Production of the instrument is sufficient evidence of a protest;" what that instrument is to be, however, he does not state; whether a certificate under *seal*, or only under the hand. Molloy, 323, says, "beyond the seas the protest under the *notary's hand* is sufficient to shew in court." He means, as is evident from the context, not that such evidence is sufficient in foreign courts, because that we have nothing to do with; but, that it is evidence, in our own courts, of bills which require to be presented in foreign countries, or beyond the seas. Mr. Chitty, in his treatise on bills, Peake, in his law of evidence, page 80, and other writers, speak of the protest "*under the notary's seal*," as being sufficient evidence; but they do not say that without seal it would not be admissible. As we have no controul over foreign notaries, who must be allowed to transact their business according to the law and custom of their country, the common sense of the thing certainly seems to be that we should take the certificate of the foreign notary in that form in which he gives it, and, moreover, that we should assume that either in using or not using a seal in verifying his certificate, he conforms to what the *lex loci* requires. It is obvious that the seal would, in reality, convey no better assurance of the genuineness of the instrument, for it would not be proved; and the court can have no knowledge of it in fact, whatever knowledge they may be supposed to have by fiction of law. In 2 Rolls Reports, 346, a question arose as to the proof of a protest, and the decision of the court is worth citing, if it be only as an amusing specimen of the extraordinary jargon of that time, "Nota que sur trial de chose beyond sea, le testimony d'un publick notary la est bon proof, and Ley, Chief Justice, dit que tel proof que ils beyond sea voullont allow, nous *allowomus*." Our recent statute 7 Vic. ch. 4, seems at first to require a seal in all protests, for the language of the third clause is expressly such; but as the statute was evidently passed for the purpose of facilitating proof of protests and notices, it would be unfortunate if it must be so construed as to require greater strictness of proof than had been required before; that was certainly not intended. We ought, I think, to consider that where it makes the production of a protest evidence for the first time, that is, in the case of inland bills, such protests must be under seal, because the statute speaks of the certificate as being under seal; but that seals are not to be held necessary in protests from foreign countries, if they were not necessary before. Considering the case apart from this statute, I am inclined to think that a protest from Lower Canada under the genuine signature of the notary is sufficient, assuming, which I believe to be the fact, that they are often so given, and have been often received in our courts. But this point we may find it necessary to reconsider, as still open, in any other case that may arise. This case does not fairly bring up the question. The pleadings are inaccurate. The defendant should not have averred that the plaintiff received his note for 143*l.* in full satisfaction and discharge of so much of the debt due by him for the goods sold, for it is incongruous to aver that the defendant gave his own note in satisfaction of the debt due by himself: it could not extinguish the debt; it could only suspend it, so long as the time given by the note had not expired. It was not a higher security, nor did it combine the security of any additional party, and it was not for a larger sum than was already due; it could not there-

fore extinguish the original debt. (a) The defendant could not rely upon the note being received in satisfaction and discharge, unless he could plead that the time for payment had not yet expired ; (b) for its effect, in extending the time of payment, would have made it a bar to any action for the goods till the credit given by the note had expired. The defendant should have said here, that the note had been received *for and on account of* the £143, not in satisfaction. He seemed, however, to be rightly under the impression, that the note would be no bar to the action, if it remained unpaid at maturity ; and, therefore, he pleads also that he had paid it : that made his plea demurrable for duplicity, as well as for calling that a satisfaction, which on the face of his plea was no satisfaction. (c) The two allegations were unnecessary and bad, as constituting a double defence ; for if the note was taken in satisfaction and discharge, as he alleges, then it would be immaterial, in this action, whether it was paid or not ; and if it was in fact paid, it would then be immaterial whether it had been given in discharge of the debt for the goods, or not ; for it would be ipso facto a payment of so much of the original debt, having been given on account of it. (d) The plaintiff, however, waived demurring, and replied, traversing both the points of this double defence, which had been irregularly pleaded ; it is true he does not simply deny them, but he replies, admitting that the defendant gave him his note for £143, *for, and on account of* so much of the debt now sued upon ; but says that he did not pay it when it fell due ; that he paid him £93 of it in money, and gave him a bill of a third party for the remaining £50 ; and then he avers that that bill, when it fell due, was duly presented, and was dishonored ; the effect of all which was that the £143 note had not been fully paid, as the defendant had pleaded : and he adds a special traverse that the £143 note was not taken by him in satisfaction, and was not paid. Now the defendant might, if he had chosen, have taken issue upon any material part of the plaintiff's inducement to his traverse, though the replication concluded to the country ; he might have denied that the bill was presented ; or, might have pleaded that notice of non-payment was not sent to Biggar, or to him ; and that the plaintiff had made the £50 bill his own by his laches ; but he was not bound to do this : he might pass entirely by the plaintiff's inducement, as he has done, and return to his own affirmation that he had paid the note, and having done so, he was at liberty to prove that he had paid it, either through the 50*l.* bill, or in any other manner, but he was bound to prove that he had paid it in some way. The affirmative of the issue lay on him, just as much as if the plaintiff had replied by simply denying the fact of payment, for, in truth, the plaintiff's replication results in that ; he says, you pretended or attempted to pay it, but you did not. The defendant answers, I did pay it ; taking no notice of the facts which the plaintiff had specially stated as leading to his traverse. It is distinctly laid down in Stephen on Pleading, 218, that where an issue is joined on a special traverse, the

(a) Bac. Ab. Extinguishment; 1 Burr. 9; 12 Mod. 538, 86; Com. Dig., Plead-er, 2 G. 10; Cro. Eliz. 727; Cro. Car. 86; J. 517; 1 M. & W. 155; 1 Tyr. & Gr. S. C.; 2 Cr. M. & R. 706; 3 Dowl. 813; 1 Gale, 776; Chitty Jr. Pleading, 282.

(b) Simmonds v. Loyd, 3 Dowl. 814. (c) 3 Dowl. 813; 1 Gale, 376.

(d) Sand v. Rhodes, 1 M. & W. 155; 2 Cr. M. & R. 706.

party traversing is, in general, not bound at the trial to prove the affirmative part, or inducement, but is entitled, as in ordinary cases, to insist on the negative of the issue joined; so here, though the plaintiff did state, in his replication, that the defendant had made a certain ineffectual attempt to pay him, but failed, he was not bound to prove his statement, when issue had been joined on the fact of payment, which the defendant had affirmed; he could stand upon his denial of payment, and put the plaintiff to shew that he had paid the money, and how; for the payment of the £143 note was the gist of the defence. The defendant was not entitled to lie by and put the plaintiff to support his special inducement; which, I think, however, the plaintiff did prove, and even on that ground entitled himself to a verdict. The case of *Craven v. Saunderson* (*a*), cited by Mr. Hagarty, is clearly no authority at variance with what I have stated, but quite the contrary. There, the plaintiff, declaring in prohibition, alleged that the defendant was liable as a parishioner of Wakefield to be rated for the repair of the parish church. The defendant pleaded certain facts that exempted him, and traversed the liability, concluding to the country. The court there held that the plaintiff did not, by joining issue on the traverse, admit the facts specially pleaded; and they do not dispute that the affirmative of the question of general liability, as a parishioner, lay upon the plaintiff, who relied upon it; just as here, the affirmative of the issue, in the payment of the note, lay with the defendant; "both parties are content to meet," they say, "on the fact of liability (as both parties here are content to meet on the fact of payment): but they held, nevertheless, the defendant must prove the special facts, on which he relied for exemption; and why? because the law declared the liability, and the defendant claimed an exemption against common right, therefore the burthen of proof, contrary to the common course, lay on him; for the plaintiff had in fact nothing to prove. Here the case is altogether different; the special facts stand equally unnoticed, and not admitted by the defendant, who goes to trial on the traverse of the payment, which he had himself alleged; that is a fact within his own knowledge, not like the question of general liability in *Craven v. Saunderson*, settled by the law of the land, and therefore he must prove it. We could not, on these pleadings, rely upon it, as proof of payment, that the plaintiff had made the 50*l.* bill his own, by laches, when he had allowed all that the plaintiff had asserted respecting that bill, to pass without denial or remark, for that would be taking the plaintiff by surprise, since he could not tell that the defendant meant to admit any part of that statement, and deny the rest; he was left to infer that the defendant, repudiating that statement, persevered in the assertion made in his plea, that he had actually paid the whole amount of the 143*l.* note, and not merely 93*l.*, and was warranted in assuming that that was what the defendant undertook to prove at the trial; and he did not prove it. (*b*)

Rule discharged.

(*a*) 4 Ad. & Ellis, 666.

(*b*) Chitty, jr., Pleading, 282 (note *i*); 3 Bing. N. C. 71.

WEDNESDAY, 12TH FEBRUARY, 1845.

DOE CLAUS *v.* STEWART.

The effect of a disclaimer by a tenant of his landlord's title, is at once to put an end to an existing tenancy, and an ejectment may be maintained without a notice to quit, and without waiting until the period when the tenancy will expire.

Ejectment for house and land in the town of Niagara. At the trial, it appeared that the defendant had been for some time the tenant of the lessor of the plaintiff, at a yearly rent, without any express demise; that he had paid rent for the premises, but that upon being called upon by the agent of the lessor, he had expressed his intention not to pay rent any longer, and that he considered that he had as good a right to the premises as the landlord; upon this, which the lessor of the plaintiff treated as a disclaimer, this action of ejectment was brought during the continuance of a year of the tenancy, without any notice to quit. The lessor of the plaintiff did not go into any evidence of his title to the premises. Upon this being proved, the learned judge at the trial was of opinion, that the lessor of the plaintiff was not entitled to recover, as he conceived that the effect of the disclaimer was only to do away with the necessity of a notice to quit, when the tenant's year had expired, and where, being a tenant from year to year, without such notice he would have been entitled to keep possession for another year; the disclaimer, in his opinion, not operating so as at once to put an end to the tenancy, but concluding it only at the expiration of the tenant's year. The counsel for the plaintiff in deference to the opinion of the learned judge, submitted to a nonsuit, with leave to move against it.

J. Boulton, having accordingly obtained a rule nisi last term,

E. C. Campbell now shewed cause. The nonsuit was right, if not upon the ground suggested by the learned judge at the trial, at any rate because there was no sufficient evidence of disclaimer, and therefore there should have been proof of a notice to quit. What the defendant said to the plaintiff's agent cannot be treated as a disclaimer. *Doe dem. Pasquali v. Williams*, (a) *Doe Calvert v. Frowd*. (b) Besides, if the tenant were treated as a trespasser, the lessor of the plaintiff should have shewn his title, and not relied upon the relation of landlord and tenant existing between him and the tenant at a former period, to dispense with the necessity of the ordinary proof after that tenancy had been determined.

J. Hillyard Cameron, in support of the rule. The effect of a disclaimer was mistaken by the learned judge. A disclaimer of a landlord's title, clearly obviates the necessity of proof of notice to quit, and at once puts an end to the tenancy. It cannot be necessary that the time for which the tenancy was created should first expire, because if the tenancy were determined by lapse of time, no notice to quit would be necessary under any circumstances; and the effect of a disclaimer on the destruction of a tenancy without a notice to quit, could never arise. The very fact of the tenant disclaiming his landlord's title, puts an end to the tenancy,

and enables the landlord to proceed against the tenant, as he might against a trespasser. *Doe Graves v. Wells.*(a) As to the necessity for proof of the lessor's title, it is clear that that could not be required. A tenant is not allowed to dispute his landlord's title, and if he has received possession from him, before he can be heard to say that he had no right to give that possession, he must allow the landlord to resume it; the tenant cannot receive the premises from the landlord, and then afterwards, by disclaiming his right to lease the premises, put him upon proof of his title.

ROBINSON, C. J.—There is no doubt that the learned judge acted under a misconception of the law at the trial, as the effect of a disclaimer must be such as the counsel for the plaintiff has contended. Whether what the tenant states in any case amounts to a disclaimer, must be a question for the jury, but if that be a disclaimer, the tenancy subsisting at the time is at once determined, and the landlord may proceed against the tenant as a trespasser, but it is not necessary that he should prove title.

JONES, J., and McLEAN, J., concurred.

Rule absolute without costs.

IN RE HAMILTON, SHERIFF, v. HARRIS, TREASURER OF LONDON DISTRICT.

A mandamus to the treasurer of a district to pay a sheriff's account, audited by the justices of the peace of his district in quarter sessions, was refused by the court; and the sheriff was left to his remedy against the treasurer, by indictment for breach of duty.

Crawford obtained a rule nisi for mandamus to Harris, the treasurer of the London District, to pay to the sheriff of the same district, certain charges, in accounts rendered against the district for services rendered in the administration of justice, which had been audited by the justices, but which the treasurer refused to pay, because he denied the authority of the justices to sanction such charges. The charges objected to are these, viz.,

	£	S.	D.
For bringing up prisoners for trial or judgment at the assizes or quarter sessions	0	10	0
For discharging prisoners from gaol, who have been discharged without trial.....	0	5	0
For furnishing calendars for the judges, crown officers, clerk of the peace and chairman of the quarter sessions.....	0	10	0
For returns of prisoners made to the government.....	0	15	0

These items the treasurer objected to pay, although they had been audited and allowed by the justices, because, as he alleged, they were not sanctioned by law, and that the sheriff could take no fee for any services rendered, except it had a legal origin.(b)

J. Hillyard Cameron shewed cause. The proper remedy against the treasurer, if he has committed a breach of duty, is by indictment, and not by mandamus. In England the courts have constantly refused to grant

(a) 10 Ad. & El. 427. (b) 7 Will. IV. c. 18, s. 1, 2, 5; 4 & 5 Vic. c. 10, s. 31, 59.

writs of mandamus against inferior officers, and the reason which has been given, and been considered sufficient for the refusal, that they would be constantly called on to act if they were to do so, will soon be equally applicable here; as in almost all the districts in the province, the magistrates and district councils are at issue upon points connected with the payment of monies out of the district funds. *Rex v. Bristow*,(a) *Rex v. Johnson*,(b) and *Rex v. Jeyes*,(c) are all authorities against proceeding by mandamus. But even if the court were inclined to grant a mandamus, they could not do so, as the charges, for the payment of which the mandamus is demanded by the sheriff, have no legal origin; and this court has already decided, in *Askin v. London District Council*,(d) that such services as those for which the sheriff has claimed remuneration, and for which no allowance is made by law, must be performed, if performed at all, gratuitously.

ROBINSON, C.J.—The questions are, first, Whether the justices could by law direct these charges to be paid out of the district funds? secondly, If they could, then, whether we should send a mandamus in such a case, or leave it to the sheriff to indict the treasurer for not doing his duty? In an early case in this court, where a mandamus was moved against the same party, who was then treasurer of another district, the objection was taken that the proper remedy was by indictment, if the duty was clear. The court were equally divided on that point, and the writ was not granted. The authority on which the writ was opposed was *Rex v. Bristow*.^(e) There have been others since, and the same ground has been consistently maintained. The *King v. Jeyes*,^(f) is a decisive authority, and a very strong case, because there the payment out of the county rates was directed by an act of parliament, and had been ordered by a judge of assize under its provisions; but the court declined to grant a mandamus, though the treasurer disobeyed the order; and it was suggested that the justices had incited him to do so. There are no reasons assigned by the court in those judgments which do not equally apply here. We might, no doubt, legally grant the writ, but the arguments against such a course are strong; and not the less so from the circumstance, that the treasurer, in this country, holds his office at the pleasure of the government, instead of being removable by the justices. I will add, that besides this objection, we should not at any rate grant a mandamus in this case; for we should certainly not command the treasurer to pay the sheriff an account, though audited by the justices, which contains charges of fees having no legal origin that we are aware of, and which, on the contrary, we consider clearly illegal. Upon this point, I refer to the judgment of this court in *Askin v. The London District Council*.^(g)

JONES, J., and McLEAN, J., concurred.

Rule discharged.

(a) 6 T. R. 168.

(b) 4 M. & Sel. 515.

(c) 3 Ad. & El. 416.

(d) Ante, 292.

(e) 6 T. R. 168.

(f) 3 Ad. & El. 416.

(g) Ante, 292.

IN THE QUEEN'S BENCH.

RULES OF COURT.

EASTER TERM, 8 VICTORIA.

I. It is ordered, that so much of the rule of this court of Easter Term, in the 11th year of the reign of King George the Fourth, regulating costs in civil and criminal cases, as relates to the allowance of any fee for drawing indictment in criminal cases, and for conducting criminal cases after indictment, to judgment, be rescinded; and that the fees to be paid to the Attorney or Solicitor General, or to any counsel for the Crown, for such services, be left as formerly to the direction of the government.

II. It is ordered, that after the first day of next term, the practice of this court, in regard to the admission of any person to defend in an action of ejectment as landlord, or otherwise, either jointly with or in the place of the tenant in possession, shall be the same as the present practice, in that respect, of the Court of Queen's Bench in England.

JNO. B. ROBINSON, C. J.
J. JONES, J.
A. MCLEAN, J.
CHRIS. A. HAGERMAN, J.

PRACTICE COURT.

EASTER TERM, 8 VICTORIA.

Before MR. JUSTICE HAGERMAN.

MILES v. HARWOOD.

According to the practice of this court, where a defendant pleads payment of money into court, it is not necessary to obtain the master's receipt for the money on the margin of the plea.

Eccles obtained a rule nisi to set aside the interlocutory judgment signed in this cause for irregularity, with costs, the defendant having filed and served pleas of payment of money into court, before the interlocutory judgment was signed.

John Duggan shewed cause.—The pleas of payment had not the receipt of the master, for the payment of the money, in the margin, and consequently the interlocutory judgment was regular; the practice in England directs that course to be pursued.

Eccles, in reply.—The rule of court in England is not in force in this province, and no receipt of the master is necessary here; the plaintiff's proceedings, therefore, are clearly irregular.

HAGERMAN, J.—The interlocutory judgment is irregular; the rule of court in England requiring the receipt of the officer of the court, for

money paid into court, on a plea of payment, on the margin of the *plea*, not being in force here. This rule must therefore be made absolute.

Rule absolute.

MATTHEWSON v. GLASS.

Where a rule for judgment as in case of a nonsuit has been discharged by the plaintiff, on a peremptory undertaking and payment of costs, and he afterwards makes default both in proceeding to trial and in payment of those costs, the court will not, unless under very special circumstances, set aside a rule absolute which has been obtained by the defendant in consequence. It is not necessary that a rule absolute for judgment as in case of a nonsuit should be served.

Adam Wilson obtained a rule nisi to set aside the judgment as in case of a nonsuit entered in this cause, on affidavits of merits, and for surprise. It appeared that default having been made by the plaintiff in proceeding to trial, the defendant obtained in Trinity Term last a rule nisi for judgment as in case of a nonsuit, which was discharged by the plaintiff entering into the peremptory undertaking, to go to trial at the next assizes, and to pay the costs incurred. The plaintiff, however, neither paid the costs, nor proceeded to trial according to his undertaking, although he gave notice of trial, which he afterwards countermanded; and the defendant accordingly, on affidavit of those facts, obtained a rule for judgment as in case of a nonsuit, absolute in the first instance, last term. This rule was never served on the plaintiff, and *Mr. Wilson* now contended that such service was necessary, but that whether necessary or not, as he was now prepared to pay the costs and would proceed to trial, the court ought to open the matter again, to let the plaintiff in to prove his cause of action, which was sworn to be a good one.

Phillpotts shewed cause.

HAGEMAN, J.—It does not appear to me that the plaintiff is in a situation to demand the indulgence he asks for. When the rule for judgment as in case of a nonsuit was discharged, upon the peremptory undertaking to pay costs and proceed to trial at the next assizes, his first step should have been to have had those costs taxed and paid; this he did not do, and although he gave notice of trial for the following assizes, he did not bring on his cause, but countermanded the notice; so that in all respects he has failed in performing his peremptory undertaking. Had the costs been paid, I might have been induced, on the affidavit of *Mr. Wilson*, that he was taken by surprise in consequence of the rule, which was made absolute last term, in the first instance, not having been served on him, to have set aside the judgment; but as this preliminary condition of the first indulgence was not complied with, I think he is not entitled to be relieved a second time, and ought not to be in any case, except under very special circumstances, which do not appear in the present instance.

Rule discharged.

McCAGUE v. CLOTHIER.

Judgment as in case of a nonsuit, cannot be obtained in a cause in which there are several pleas on which no issue has been joined, by adding similiter.

Richards applied for a rule nisi for judgment as in case of a nonsuit, but stated that there were several pleas in the cause, on which no issue had been joined, by adding similiter.

HAGERMAN, J.—The rule must be refused. A cause is not at issue until similiter are added upon all the pleadings.

Rule refused.

SHERWOOD ET AL. v. THE BOARD OF WORKS.

The court, although affidavit was produced that there was no member of the Board of Works residing in Upper Canada, on whom a copy of process could be served, refused to allow service to be made on an engineer employed by the Board in Upper Canada, or by affixing a copy of the process in the crown office.

Richards applied for a rule that service of a copy of process on one Samuel Powers, or the affixing a copy of process in the crown office, should be deemed good service, on the defendants. He filed an affidavit stating that the plaintiffs were desirous of instituting proceedings against the Board of Works, for work done under a contract with the Board, on the Welland Canal, for which they were advised and believed they had a good cause of action; that neither the President of the Board of Works, nor the Secretary, nor any other officer belonging to it, is resident in Upper Canada, within the jurisdiction of the court, upon whom process can be served; but that Samuel Powers is the engineer in charge of the works on the canal; that he is the senior officer or engineer of the Board within the jurisdiction of the court, and that the work for which payment is claimed, was done under him.

Richards, in support of the motion.—The Board of Works is a corporate body, constituted under 4 & 5 Vic. ch. 38, by section six of which statute, it is declared to be a corporate body, capable of suing and being sued. The third section enacts that the board shall not consist of more than five members, one of whom shall be chairman; the fourth section provides for the appointment of a secretary; and by the sixteenth section, the Board is empowered, with the sanction of the person administering the government, to employ engineers, surveyors, and such other persons as may be necessary. The statute of Upper Canada, 3 Will. IV. ch. 7, to facilitate legal remedies against corporations, expressly applies to a case like the present. That statute provides, "that all writs and process of law thereafter to be issued against any body corporate in the commencement of any action, and all papers and proceedings before final judgment in any such action, may be served on the president, presiding officer, cashier, secretary or treasurer thereof, in the same manner as upon any individual defendant in his natural capacity, or on such other person, or in such manner, as the court in which the action shall be brought, may direct." The statute does not confine the service of process to officers of the corporation, but allows the service to be made on such other persons, and in such manner as the court may direct. Here there is no person on

whom the service can be made without application to the court; and, as it will amount almost to a denial of justice, if the plaintiffs cannot proceed upon their contract, the court should grant the rule for the service of the process in one of the ways proposed.

HAGERMAN, J.—There is no doubt that a very wide discretion is reposed in the court by 3 Will. IV. ch. 7, but I do not think that it would be safe to exercise it to the extent prayed for in the present instance. If the service on the engineer were allowed as good service, without any proof that he had any share in making the contracts, or that he had authority to bind or represent the corporation, much injury might arise to the public interests; collusion and fraud might be practised that would lead to great injustice. The service, if allowed on any one, except the officers named in the statute, should at all events be made on some person who represents or superintends the interests of the corporation, which the engineer does not. As to directing that the copy of process put up in the crown office, should be deemed a valid service, I think no such order can be properly made in this case, any more than in any other case.(a) When a party has been duly served with the first process issued in a suit, and upon which he is brought into court, it is competent, under particular circumstances, to direct that putting up copies of subsequent proceedings in the crown office, shall be deemed good service; but, as I apprehend, in no other instance. The *manner of service* mentioned in the statute, must, I think, refer to the manner of actual service on some individual connected by office with the corporation, and not upon one employed as occasion may require to execute or superintend the execution of any particular work. There is no doubt that failure of justice must be the consequence, if some person be not appointed by the Board of Works within the jurisdiction of this court, upon whom process may be served; and I have no doubt, that if that fact be represented to the government by the present plaintiffs, or any other party interested, the inconvenience will be removed. If, however, there should be proof that application has been made to the Board at Montreal, where it is stated the members reside, to appoint an attorney to receive process in a suit about to be commenced, and it be shewn that no attorney has been appointed, and that there is not any person within the jurisdiction of the court, upon whom process can be served without the direction of the court, an order will then be made to facilitate the proceedings, so that further delay may not take place in enforcing the remedies of parties who have just claims.

Rule refused.

DOE CRUMBACK v. ROE.

Where the notice to appear, in a declaration of ejectment, was addressed to the tenant by the christian name of *James* instead of *William*, an amendment in the notice was allowed.

Crooks obtained a rule nisi to amend the notice to the tenant, annexed to the declaration in ejectment in this cause, by substituting the name of

(a) Buchanan v. Bucker, 9 East. 191.

William for *James*, on affidavit, shewing that William was the true name of the tenant in possession; that the service was upon him, and that the notice was properly explained and read over to him at the time of service. He cited several cases as authorities for his rule.(a)

R. E. Burns shewed cause.

Hagerman, J.—The authorities cited by the counsel for the plaintiff are clearly analogous, and I therefore think that the rule should be made absolute.

Rule absolute.

FERGUSON v. MALONE.

It is irregular, in an action of dower, to style the parties in the cause defendant and respondent, and affidavits so entitled cannot be read.

This was an action of dower, in which *Crooks* had obtained a rule nisi to set aside the service of the writ of summons, on several grounds, among which were, that there were not fifteen days between the service and return of the writ, which he contended were required by the practice in England, and had been considered necessary in this court, in *Fullmer et ux. v. Dougan*.(b)

Foster, for the plaintiff, took a preliminary objection to the affidavits on which the rule had been obtained; the parties in the action were styled defendant and respondent, and however correct the addition to the plaintiff's name might be, the defendant should have been styled tenant, and not respondent. The courts, both in England and here, have required the parties, in late years, to use the words "plaintiff" and "defendant" in the style of the cause, in all affidavits, and have refused to allow affidavits to be read which were defective in that respect; and if the addition be at all necessary, it must be correctly stated. The defendant here is not a respondent, and as an improper addition has been given to him in the affidavits, they cannot be read, and his rule must in consequence fail.

Crooks, in reply, contended that the word respondent was correct, and was quite as sufficient in this action, as defendant or tenant would have been.

Hagerman, J.—I am obliged to give effect to the objection urged by the plaintiff's counsel against these affidavits. The usage and practice of the court point out the style to be adopted in describing parties to suits, and except in error, the answering party is never styled respondent; and there is no more reason for so styling him in dower, than in assumpsit. In real actions the most proper term to apply to the defendant, is tenant. This view of the matter relieves me of the necessity of considering the irregularities in the proceedings moved against; but I think that it may be as well to notice one which, if it could have been taken into consideration, I should have deemed valid, viz., the insufficiency of the service of the process, fourteen days only, instead of fifteen as required by statute 31 Eliz. ch. 3, sec. 2, having intervened between the service and return of the writ. Upon a reference to Roscoe, on Real Actions,(c) it will be

(a) 5 Moore, 73; 6 M. & Sel. 203; 2 Dowl. 567; 3 Dowl. 563; 6 Dowl. 629.

(b) 1 U. C. Jurist, 402.

(c) 1 Roscoe, 147.

seen, that fifteen days are required between the service and return of process; fourteen days between proclamation (if necessary in this country, upon which I give no opinion,) and the return day. As to costs, as there have been irregularities on both sides, and the one most deserving of notice on the part of the plaintiff, the rule will be discharged without costs.

Rule discharged, without costs.

DOE MYERS v. TOLMAN.

Where a verdict was rendered for the plaintiff, in ejection, subject to points reserved, and without any argument of the points, the plaintiff entered judgment, and took possession of the land in dispute, the court refused to interfere and set the judgment aside, after a lapse of more than two years.

Crooks shewed cause against a rule nisi obtained by *Crawford*, to set aside the final judgment entered in this cause, on grounds disclosed on affidavits and papers filed. It appeared, that more than two years ago a verdict had been rendered for the lessor of the plaintiff, for the premises in question, subject to the opinion of the court on certain points reserved; the lessor of the plaintiff, however, without any argument of those points, entered his final judgment, and turned the defendant out of possession. *Crooks* now contended, that after so great a lapse of time the court would not interfere; if the defendant had been aggrieved, he should have applied more promptly; he could not be allowed to lie by for more than two years, and then come in and set aside the proceedings.

HAGERMAN, J.—There is no doubt that had this motion to set aside the judgment been made at an earlier period, it must have prevailed; but upwards of two years have been suffered to elapse, the defendant being all the time aware of the irregularity, and in fact, possession of the premises having been delivered to the lessor of the plaintiff, without any resistance or objection on his part. The rule should therefore be discharged, it being left to the defendant to hear argument on the points reserved at the trial, and subject to the decision of which the objection was taken. If the court, under the circumstances, think that the justice of the case requires that such a motion should be entertained, and if the points are found for the defendant, the judgment entered will of course be set aside; but until such decision is obtained, I think the proceeding so long apparently acquiesced in, or at all events not specifically moved against, should be allowed to stand.

Rule discharged.

IN THE QUEEN'S BENCH.

SITTINGS AFTER EASTER TERM, 25TH FEBRUARY, 1845.

MORRIS ET AL. v. GRAHAM ET AL.

After the decease of a sheriff, the court will not stay proceedings in an action against his sureties on their covenant under statute 3 Wm. 4, ch. 8, for a default committed by the sheriff in his life time, until a recovery shall be had against the sheriff's representatives, nor will they direct in such case that the execution on the judgment against the sureties, shall be endorsed first to levy of the property of the sheriff.

The plaintiffs sue the defendants on a covenant given by them as sureties for the late sheriff Powell, of the District of Bathurst, assigning as a breach, that the late sheriff had collected money for them on an execution, and had not paid it over. The defendants plead, denying the deed denying that the sheriff had made the money, and that he had duly paid over whatever money he had collected for the plaintiffs. At the trial, the cause of action was clearly proved, and the plaintiffs received a verdict for £24 6s. 2d. The defendants moved to stay proceedings until the plaintiffs have first recovered judgment against the representatives of the deceased sheriff, and endeavoured to make the amount from his estate. (The sheriff died before this action was brought, and it was sworn on the part of the plaintiffs, that he died wholly insolvent, and that no one had administered.)

Sullivan shewed cause. There was no recovery against the sheriff, and there could, therefore, be no indorsement on the plaintiffs' execution against him. If the proceedings could be stayed, it might be proper, if the party praying the stay could shew, on affidavit, that there was property of the sheriff remaining, which could be seized.

Wilson for defendant. The act (*a*) requires that the sheriff should be a party, and if he die, the proceedings against him should abate; at any rate the court might interfere, as the sureties are more likely to be prejudiced after the sheriff's death, than during his life. (*b*)

ROBINSON, C. J.—I do not conceive that we can, with any propriety, grant this application. The covenant being entered into by the defendants, under the statute, the plaintiffs have, by law, a right to sue upon it, when they can show a breach, and we cannot impede them in the exercise of this right, further than the statute expressly, or by clear implication, enables us. The provision of the act is natural and just, which compels the sheriff to be included in the action, and directs that execution shall first be levied upon his property; but, here, the sheriff, being dead, could not be joined, and I have no reason to suppose that the Legislature would have thought it reasonable, in such a case, to stop any proceeding against the sureties, till the result of an action against the sheriff's representatives could be ascertained. We ought not to throw on the injured party the delay, and risk of costs in such an action, when

(*a*) 3 Wm. IV. ch. 8.(*b*) 8 M. & W. 873.

the act does not; and this is a strong case to shew how inconveniently such a provision would have operated, for here it is sworn that the sheriff left no property, and has no personal representative.

JONES, J.—This is an action brought against the sheriff's sureties of the District of Bathurst, upon their covenant; the suit was instituted after the death of the sheriff, and this application is made to stay the proceedings against these defendants, till an action shall be brought, and a recovery had, against the personal representatives of the sheriff, upon which his effects and lands shall be exhausted, in accordance with, it is contended, the spirit and intention of the 21st section of the statute 3 Wm. 4, ch. 8, which enacts, that the sheriff shall be joined in any action to be brought on the covenant against all or any of the sureties, and of the 16th section, which requires that the amount of the f. fa. against the sheriff and his sureties shall be levied upon the goods and chattels, and the lands of the sureties, only in default of the goods and chattels and lands of the sheriff. It has been decided that, upon the death of the sheriff, his personal representatives cannot be joined in the action with the sureties. It is not contended, and if it were it would not be held, that the sureties are discharged by the death of the sheriff. The meaning of the statute is, that when the sheriff can be joined, he must be, in an action against the sureties. When dead, or out of the jurisdiction of the court, he cannot be joined, and, in such case, it cannot be required that any proceeding should be had against his effects or lands, before the execution can be satisfied by the seizure of the property of the sureties. If the sheriff, in any case, shall have goods or lands, his sureties, who may be compelled to pay for his default or neglect, may have their recourse upon them; but it could not be considered just or equitable that the party seeking indemnity from the sureties, should first be required to prosecute his claim against the representatives of the sheriff, although he may be quite certain that the proceeding will prove altogether unavailable. That experiment should be made, if by any one, at the expense of the sureties.

Rule discharged without costs.

FRASER QUI TAM v. THOMPSON.

Where after verdict for the plaintiff, and new trial granted for variance between the statement of the loan and forbearance as laid, and that proved, in a qui tam action for usury, the plaintiff moved to amend his declaration, by making it correspond with the evidence at the trial, the court discharged the rule.

The plaintiff sues as a common informer, for a penalty, under the statute against usury.(a) Objections were taken at the trial, on account of a variance between the periods of forbearance stated in the declaration, and the particulars of the loans as proved; but these objections were over-ruled by the learned judge, and the plaintiff recovered a verdict for 3000*l.* Upon motion for a new trial, the court held the objections fatal, and the verdict was set aside, and a new trial granted.

J. Hillyard Cameron, for the plaintiff, now moves to amend the declaration, so as to make the periods of forbearance and the sums forborne

(a) 51 Geo. III. ch. 9, sec. 6.

correspond with the facts as proved at the last trial. In the declaration as it stands, it is alleged that the defendant received, on the 5th of September, 1842, from one Sutherland, 150*l.*, for the forbearance of 1000*l.* lent on that day, for a year; and in the second count, the sum of 1000*l.* is stated to have been lent on the 3rd of September, for a year. It will be seen, by the judgment of this court, given in Michaelmas Term last, (a) that the circumstances as to the loan and the forbearance, as they were proved on the trial, varied so materially from these statements, that the verdict which was rendered for 3000*l.* penalty could not be sustained, and a new trial was ordered. Now the plaintiff desires to be allowed to amend, by alleging a forbearance of 400*l.* from the 3rd September, 1842, for a year; of 300*l.* from the 5th September, for a year; of 100*l.* from the 24th December, 1842, for a year; of 100*l.* from the 1st February, 1843, for a year; and to add a count, alleging a forbearance of 600*l.* from the 5th September, 1842, for a year.

Blake shewed cause. The amendment called for, ought not to be granted, either upon general principles of law, or upon the particular circumstances of the case. The action was for a penalty, and the plaintiff had had a trial; on that trial, or rather in the subsequent proceedings in term, he had failed, and he now required an indulgence from the court to enable him to proceed in a penal action of the worst possible description, the circumstances of which had rung from one end of the district to the other, and its fruits were already seen in the numerous qui tam actions to which it had already given rise, and the prolific litigation that promised to spring from it hereafter. The whole case and the evidence given on the trial, had a most demoralizing tendency, and it was contrary to public policy that such proceedings should be encouraged. The courts in England always looked on delay in penal actions, with most unfavourable eyes, and no case could be found in the books, in which there had been such delay as there had been here. This cause was tried at the spring assizes of last year, and the verdict was set aside, and a new trial granted in August, and now the first application is made to amend. It is true that the plaintiff commenced applications to amend before, but they were not proceeded with, and there is nothing satisfactory shewn to account for the delay, and now when the time for the plaintiff or any other party to sue as a common informer has expired, he, knowing that a new action cannot be commenced, comes forward with this motion to amend. The court will not grant the indulgence craved, it is against the policy of law, and it is against public policy, that any thing so demoralizing should be again brought before the country. The authorities are strong against such an amendment in a penal action. (b) In *Matthews v. Swift*, (c) *Tindal*, C. J., says, "all the cases have laid it down that amendments are to be made in the discretion of the court, and only in furtherance of justice. I admit that such discretion must be exercised according to law, and that the courts cannot take up and act upon an individual discretion: but we have a right on such occasions to consider the nature of the action, though not to weigh the merits of the cause. If according

(a) Ante page 314.

(b) 5 Burr. 2184; 6 T. R. 174, 554, 743; 7 T. R. 55; 10 B. & C. 691.

(c) 1 Bing. N. C. 735.

to this judgment, an amendment is to be made only in furtherance of justice, the court will not interfere here.

Cameron in support of the rule. The court have nothing whatever to do with the policy of the usury laws, they are called upon to administer the law as it is, not as any particular individual or class of individuals may think that it ought to be. The statute of usury renders a man who takes illegal interest, liable to a penalty, and the party who sues for that penalty, is as much entitled to the protection of the courts as any other suitor. Here the amount loaned was large, the interest taken excessive, and though there may be inclination to shew but little favour to an informer in such a case, there ought to be less inclination to assist a man who has committed a plain and positive breach of a well known law. The judgment in Matthews *v.* Swift, shows that the court will not look to the merits of the cause, in which the amendment is prayed, and amendments have been allowed in penal actions even after the time for bringing the action has expired; Maddock *v.* Hammett. (a) In some cases great strictness has been pursued, but those cases have arisen principally on writs of right, penal actions have generally stood on the same ground as other actions.

ROBINSON, C. J.—In determining upon the propriety of granting this amendment, I reject all arguments upon the supposed policy or impolicy of the usury laws; while they are in force, they are to be carried fairly into effect. For my own part, if I were at liberty to act upon my private judgment on that point, I am not inclined to look upon them either as oppressive or impolitic; but one cannot look with favour, certainly, on the person who has obtained a loan on such terms as he has willingly acquiesced in, promoting afterwards a prosecution for the penalty under the statute. Whether this is a case of that kind, or not, may not be thought certain, upon the evidence; at all events, if it be such, the party must have the full effect of the statute, and of the principles upon which courts of justice have executed its provisions. But I should be averse to going farther to afford facilities to such prosecutors, by remedying the errors of parties, than the courts can be shewn to have gone, because it is certain, that at the present day, the tendency of the legislature is rather to relax, than to draw closer, the restrictions upon lending money; especially in regard to loans made to men actually engaged in mercantile business. There have no doubt been cases, though not very numerous, of ordinary actions between party and party, where, after granting a new trial, courts have allowed an amendment in the pleadings, on one side, or the other, or, if necessary, on both, in order to adapt them to the facts of the case, or defence intended to be set up. In matters of contract, where there has been an accidental slip, not arising from a gross want of care, but such as may well happen in the multiplicity of business, and still more where a party, exercising his best judgment on a doubtful point, has happened to take a wrong course, it would be wrong not to afford such facilities, though for obvious reasons they will be extended sparingly. In actions of another character, where the object is to punish by vindictive damages, a different reasoning certainly applies, still, even then the facts of each case may require to be considered; and, it will be found that

courts are much influenced by the consideration, whether the plaintiff is pursuing in a harsh spirit, a remedy which in strictness is open to him, or whether he is fairly seeking, by the only form of action which he can use, a recompense for a serious injury, which has been deliberately inflicted upon him. In the latter class of cases, I conceive that the nature of the action, and the claim sounding wholly in damages, would not weigh much with the court; but they would grant what they might consider reasonable in the cause, by enabling a party, even in a late stage of his proceedings, to amend his errors. This plaintiff here is not as a person claiming damages for any injury done to him, still less seeking merely to enforce the execution of a contract, which another is bound to perform; but he stands before us as a common informer, claiming a penalty, to which another person has subjected himself, as he alleges, by his misconduct in a transaction, which he, the plaintiff, had nothing to do with, and which a statute allows him to sue for and to recover, if he entitles himself by suing for it effectually, within a certain time. Now it might go far towards defeating the good intentions of the legislature, if courts were to be so rigid as to refuse peremptorily to allow to parties suing for such penalties, to correct, in any stage of the cause, any trifling inaccuracy in their practice or pleadings, so that the slightest inadvertence must be fatal. They have not been so unreasonable; on the contrary, as to amendments such as would be granted in the usual course of practice in other actions, they have granted them equally in penal actions; but that the courts will not go farther and have not gone further, in assisting a party by indulgence in granting amendments to recover a just debt, than they would go to enable another party to punish for a trespass, or enforce a penalty, is what we cannot maintain. Delay, in the latter class of cases, is held to be a decisive objection, in the former it would seldom weigh against the application. Here, this plaintiff, after suing for a penalty, as arising upon one usurious loan, of one sum, made on a certain day, and to be paid at the end of a year, goes to trial upon that charge, and, upon hearing all the evidence given by the defendant's witnesses as well as by his own, he finds that the facts of the offence were not as he supposed, and that there were several loans of different sums made at different times, and he asks now to be allowed to accommodate his case to the evidence, by alleging a series of usurious transactions, no one of them agreeing with that upon which he went to trial. Either he must have been negligent in not ascertaining from his witnesses the true state of the case, or his witnesses must have deceived him, which he does not allege, or, he must desire to avail himself of the additional information which the trial has brought out. With no disposition to look with favour on persons, who, for the sake of unlawful gain, deliberately and artfully violate the injunctions of an act of parliament, I consider that one who sues for a penalty under a statute of this kind, should know, before he goes to trial, what offence has been committed, and should be careful that he has described it at least with substantial accuracy; otherwise people might bring an action of this description, as fishing bills are filed in Chancery, to get at the real facts, in order to make use of them in what may really be looked upon as another cause. No case has been cited to us in which such amendments as are asked for here have been made in penal actions after trial, and I am persuaded none have occurred. In *Bearcroft v. The Hundred*

of Barnham Stone, 3 Lev. 347, the court had difficulty, after repeated arguments, in allowing amendments in an action against the Hundred for damages, where the record had been taken down to trial, and withdrawn. In modern times, amendments have been more liberally granted; but the relaxation goes to this length only, "that in penal actions, as in others, the court will allow an amendment of the declaration, but it is governed by the discretion of the court according to the circumstances of each case, and while the case is in progress."(a) I do not see that any decided objection lies against amending in this case, on the ground of delay, except indeed, that the moment the variance was discovered, it was so evidently fatal, that the party need not have awaited the issue of any motion against his verdict, but might have moved at once. I am opposed to it, however, on the ground that, to allow a plaintiff to amend his declaration in an action for a penalty, after the case has been actually tried, and in such a manner as really to introduce essentially different causes of action, after the period for suing had elapsed, would not be reasonable or just, and is not warranted by any instance that I can find.

MCLEAN, J.—It appears to me, that from the evidence received on the trial of this cause, the verdict should have been for the defendant, inasmuch as the plaintiff failed to make out the forbearance for the amount, and on the terms stated in his declaration, as he was bound to do; this application should therefore, I think, be regarded as an application by the plaintiff for a new trial, with leave to amend his declaration, so as to make it correspond with the facts as disclosed in evidence on a former trial. I do not think any instance can be found, in which such an application has been entertained. It may be a question whether the plaintiff might have amended at nisi prius, but no application was then made. It is now too late, after the plaintiff has taken his chance of a verdict on evidence which did not support his case. The effect of allowing the plaintiff now to amend, would be to sanction as it were a new action, after the expiration of the period limited by law for bringing such an action. I quite concur in the opinion given by the Chief Justice, and agree with him that the rule to amend must be discharged.

Rule discharged.

HAMILTON, ADMINISTRATRIX, v. DAVIS ET AL.

The court, under special circumstances, allowed an amendment of a defendant's pleadings, after argument and judgment on demurrer against the rejoinder.

R. B. Sullivan for the defendants moved to amend, after argument of demurrer, on an affidavit of good defence which was insufficiently pleaded. The defendants to this action on an indemnity bond pleaded non damnicatus; the plaintiff then replied, assigning a breach, by shewing that she had paid a sum of money to persons against whose claim the defendants had given the indemnity bond; the defendants rejoined that she had paid

(a) Bondfield q. t. v. Milner, 2 Burr. 1098; 5 Burr. 2839; 5 Moon, 330; 2 T. R. 707.

the money without necessity, and of her own wrong ; the plaintiff demurred to this as a departure from the plea.

Eccles shewed cause.

ROBINSON, C. J.—It was not perfectly clear to us whether the plea was or was not bad upon that ground, at least I confess I had some doubt upon the point, but we gave judgment for the demurrer, and the defendants craved leave to amend, shewing by affidavit that they had good ground for their rejoinder, but did not conceive that it was necessary to plead the facts then relied on, until the plaintiff had alleged the breach. We think this not a case in which the defendants should be shut out from a substantial defence by their informal pleading, as this point may have seemed doubtful, and therefore give leave to the defendants to amend their pleading on payment of costs.

Rule absolute.

IN RE PETITION OF SAMUEL USHER FOR A WRIT OF PARTITION.

The provisions of the statute 2 Wm. 4, ch. 35, as to issuing writs for partition, do not apply to cases where the parties consent to a partition.

The petitioner applies for a writ of partition under our statute 2nd Wm 4th, ch. 35.

ROBINSON, C. J.—There is no proof of such notice being served on the other tenants in common as is required by the 2nd clause of the act, but it is shewn that all the parties interested have consented, in writing, to the partition desired ; this makes it a case of proceeding by consent, which is provided for in the 5th clause, and no writ is necessary. The guardian of the infant child of one of the devisees is competent, I conceive, under the 9th clause, to concur in the consent, on the part of the infant. If it were a case in which we could properly grant a writ, it would be proper that the titles of the devisor to the property should be shewn to us.

Writ refused.

MCDONALD v. CLARKE.

The court refused to allow a plaintiff costs in an action on a judgment, although the defendant had pleaded a false plea of nul tiel record.

Wilson moves under the statute, (a) that the plaintiff may be allowed to tax his costs in this action on a judgment, on the ground that the defendant had pleaded a false plea of nul tiel record. (b)

ROBINSON, C. J.—It has been lately decided in England, in the case of *Hanmer v. White*, (c) that the defendant pleading a false plea, is not a ground for certifying in order to enable the plaintiff to tax costs, and it ought not to be so considered, for the question is, whether the plaintiff was under any necessity of bringing the action, and that cannot be affected by the defence which may be set up in the action ; no doubt that defence

(a) 3 Evans Statutes, 135, note.

(b) 5 Taunt 264.

(c) 1 Dowl. & Lown. 653; 1 Ch. Reports, 190; 4 Scott's N. R. 749; 1 Dowl. N. S. 405.

has the effect of increasing the costs, which the plaintiff has brought upon himself by bringing, for all that is shewn, an unnecessary action.

Rule refused.

HENDERSON v. HARPER.

In trespass quare clausum fregit, where judgment was given against the plaintiff, on demurrer for defects in his replication, and the plaintiff desired to amend, by adding a count for assault, the amendment was refused.

In this case, after argument of demurrer, and the court expressing their opinion that the plaintiff's replication was bad, he moved to amend on affidavit, desiring to withdraw the replication, and reply de novo. (a)

ROBINSON, C. J.—Having read the affidavits on both sides, we decline to grant leave to amend. The plaintiff complains in trespass for wrongfully entering into his house, and that is the gist of the action, though various circumstances are stated in aggravation. The defendant pleaded that the close was his freehold, to which the plaintiff replied, that the defendant had demised the house to him to hold at the defendant's will, and afterwards entered and expelled him, which was the trespass complained of. This replication we held to be bad for the reasons given in delivering our judgment. It is plain that the plaintiff brought a description of action which he had no right to bring, and we are not sufficiently satisfied that he has merits on his side to allow him, by amending, to convert the present action into one of another kind. If, in the manner of taking possession of his own house from a tenant who only had a right to hold during his pleasure, the defendant committed any substantial injury to the plaintiff, either in regard to his person or goods, there are suitable remedies for such injuries. Trespass quare clausum fregit, was improperly brought under the circumstances. (b)

Rule refused.

THORPE v. GRIER.

In an action for seduction, the court refused a new trial where there was much conflicting testimony, and the verdict was in favour of the plaintiff for 100*l.*, though the judge who tried the cause was unfavourable to that verdict; but the rule for a new trial was discharged *without costs*, as the plaintiff had improperly written letters to the court on the subject of the suit.

In this case the plaintiff had recovered a verdict, with 137*l. 10s.*, damages, for the seduction of his daughter. The defendant moved to set it aside, on affidavits, and on the ground of excessive damages. The grounds of the motion sufficiently appear in the judgment of the court.

Blake, counsel for plaintiff.

Phillpotts, counsel for defendant.

ROBINSON, C. J.—We do not find that the affidavits furnish such a ground as we could properly take for setting aside the verdict. A material witness is sworn to have been absent, but the defendant did not, on

(a) *Ante page 481.*

(b) *Taylor v. Cole, 3 T. R. 292.*

that account, apply to postpone the trial. There is no ground laid for inferring that the plaintiff used any means to prevail on him to absent himself, and besides, from the conduct of this witness on a former occasion, there is too much reason to believe that his not attending was not occasioned by any accident or impediment, so that there is no reason to expect that his attendance could be procured on another trial. Then, as to the propriety of the verdict, comparing it with the evidence given to the jury, we cannot say that the cause of action was not fully proved, for it certainly was, by the testimony of the young woman. If the jury believed her they could do no otherwise than find for the plaintiff, as they have done; and, both the credibility of witnesses, when the evidence is conflicting, and the amount of damages, in cases of this description, are matters peculiarly within the province of the jury; and, on the latter ground, that is, for excessive damages, the court, in actions of this nature, always interfere with reluctance, and only when they are evidently and greatly excessive, with reference to all the circumstances proved. We do not find any sufficient ground for holding that the jury ought not to have given credit to the plaintiff's daughter, when she swore that the defendant was the father of the child; several witnesses, indeed, declared that they had also criminal intercourse with her, but none of them gave evidence inconsistent with the fact sworn to, of this defendant being the father of the child. They did, to be sure, give evidence of conduct which, if true, was more discreditable to themselves than to the plaintiff's child, whose departure from virtuous conduct must, according to their account, have begun at an age when habits are not formed, and the judgment can be little trusted; but all that the defendant's witnesses have stated may be quite true, and yet it may be quite true, as the young woman has sworn, that the defendant had criminal intercourse with her, and is the father of her child. This being so, I do not think that the defendant shall claim, as a matter of right, that courts of justice shall be governed by the nice distinction, whether he has ruined the honor and peace of the plaintiff's family, or has only contributed to ruin it. What the defendant presses upon us is, that if we were to grant a new trial, and he could obtain the evidence of a witness, which he was aware of at the last trial, but whose absence he did not make the ground of any effort to postpone the trial, he could bring testimony to contradict that of the young woman as to the child's being his. I think for the sake of the community, as well as in justice to the parties, since the defendant does not deny that he had criminal intercourse with the young girl, we ought to refuse a new trial, in order that a court of justice may not be again engaged, in the hearing of a numerous audience, in the attempt to make out, from a mass of disgusting testimony, and a scrupulous comparison of dates, which of several criminal persons is the most likely to have been the father of the child. This is not a satisfactory case, on the whole complexion of it, though we feel it right to allow the verdict to stand. I cannot avoid noting the very reprehensible conduct of the plaintiff in addressing letters to two at least of the judges of this court, for the purpose of influencing their decision; he may, possibly, be so ignorant as not to feel the gross impropriety of such an act, and we ought not, therefore, to let it have the effect of keeping open a litigation which, on other

grounds, we feel it right should end with this verdict, but we discharge the rule without costs on that account. (a)

JONES J.—I gave the jury to understand, in my charge, at the trial, that my opinion was not favourable to a recovery by the plaintiff; it was, however, a case sounding wholly in damages, and depended upon the credibility of the witnesses, of which the jury were the judges; and although I must say, I think, under the evidence, if I had been upon the jury I should have given a verdict for the defendant, still, I do not think the case is one in which the court should interfere to relieve the defendant; he has himself admitted a criminal intercourse with the plaintiff's daughter, and it is not to be nicely investigated and determined whether he is the father of the child, or whether some one else might not be.

MCLEAN, J.—This action was brought for the seduction of the plaintiff's daughter, and a verdict was rendered, at the last assizes, for the plaintiff, and 100*l.* damages. It is now moved to grant a new trial, for excessive damages, and on the ground of the verdict being contrary to law and evidence. In the argument, it was urged that the weight of evidence was against the verdict; that the plaintiff's daughter was shewn to have sworn falsely, in denying her having had improper intercourse with other persons besides the defendant, and that therefore her testimony is unworthy of belief; and that the damages are excessive for the alleged seduction of a person of so bad a character. There is no doubt that the witnesses on the part of the defendant do shew, if their testimony is credited, that the plaintiff's daughter swore falsely as to her intercourse with other persons; but there seems to be as little doubt that the defendant had intercourse with her, indeed he admitted that fact to a witness sworn on the trial. It was therefore a question for the jury, whether they believed that the defendant was the father of the child or not, and the measure of damages rested of course with them. There was no evidence of any connivance of the plaintiff in the misconduct of his daughter; and though the verdict is, perhaps, larger than it ought to be under all the circumstances, I cannot say that it is so excessive as to afford a sufficient ground to set it aside on that account. The jury have believed the plaintiff's daughter that the defendant was the father of her child, and have rendered a verdict accordingly. I cannot say that they were wrong in their judgment of the witness's credibility, which was impeached before them by the defendant, and as it was their duty to weigh the evidence, and there was evidence to justify the finding, I do not feel at liberty to interfere with their decision. The rule must, therefore, be discharged.

Rule discharged, without costs.

(a) 3 B. & Al. 692; Cowper, 808; 3 T. R. 551; 2 Ch. Reps. 195, 268; 1 Burr. 56, 390; 3 Wils. 38.

BEEKMAN, ASSIGNEE v. WORKMAN ET AL.

THE SAME v. McDONELL ET AL.

THE SAME v. McGLASHAN.

Giving a confession of judgment payable immediately for a sum which is justly due to a creditor, who has pressed the debtor for payment, there being other creditors, is not a voluntary and fraudulent procuring of the debtor's goods to be taken in execution in contemplation of bankruptcy, within the meaning of the Bankrupt Act, 7 Vic. ch. 10.

In Workman's case plaintiff sues as assignee of Gillespie, a bankrupt, for money had and received. The action is brought to recover a sum of 158*l.* 2*s.* 4*d.* levied and paid over by the sheriff on an execution against the bankrupt at the suit of these defendants. Defendants plead, 1st, general issue; 2nd, that plaintiff is not assignee; 3rd, that after the bankruptcy, but before the date of the commission, they recovered judgment against Gillespie and sued out execution, whereon the sheriff levied money out of goods of which Gillespie was still possessed, subject to the title by relation of the plaintiff, who afterwards became assignee; that the money was paid over by the sheriff to the defendants; that the execution was bona fide executed and levied before the date of the commission, and before the defendants or either of them had notice of any act of bankruptcy. Plaintiff replies to this plea that Gillespie had confessed judgment to these defendants without stay of execution; that judgment was thereupon entered, and the said execution issued; that Gillespie when he gave the confession was in insolvent circumstances, and gave this confession in contemplation of bankruptcy, willingly and fraudulently, in order to give to these defendants a preference over his other creditors, he being a trader within the bankrupt laws; that the goods of Gillespie were sold under that execution which was an act of bankruptcy, and that a commission of bankruptcy issued against him within four months. Plaintiff further avers, that when defendants took this confession, and before recovering their judgment or putting their execution into the sheriff's hands, and before the monies were levied under it, they had notice of this act of bankruptcy; and he traverses that the execution was bona fide levied before the date of the commission, and that at the time of levying defendants had no notice of any act of bankruptcy. The cognovit was given on the 1st January, 1844, with permission to enter judgment if money not paid on that day, that is without stay of judgment or execution. It was not denied that the debt to defendants was a just debt. Gillespie was at the time indebted to other creditors. There had been no process sued out at the suit of these defendants. Gillespie was a trader in a village in the country, and on the 29th December, these defendants, who reside in Toronto, instructed an attorney there to procure payment or security for their debt; he saw Gillespie on the 1st of January, and requested payment; the attorney then told him that he must give security or proceedings would be taken against him; he declared that he was unable to pay. The attorney requested him to give a cognovit, which he at first declined doing, until he could go to Toronto, but the attorney insisting upon it, he did then give the cognovit for the debt, on which judgment was entered on the following day; the cognovit included

the amount of a note given by Gillespie to the defendants for 40*l.*, which was not yet at maturity. At the time Gillespie confessed judgment, he was carrying on business as usual, having a shop with several hundreds of pounds worth of goods in it; the attorney who took the cognovit had heard nothing of his insolvency. The learned judge directed the jury that if Gillespie gave the cognovit to defendants upon their request, and to secure their debt, and without any desire on his part to give a fraudulent preference not in contemplation of bankruptcy, and without knowledge of any prior act of bankruptcy, then the plaintiff was not entitled as assignee to recover back the money which the defendants had received under their execution. The jury found for the defendants.

In McDonell's case the plaintiff sues in assumpsit for money had and received. Defendant pleads, first, general issue; second denies that plaintiff is assignee. It was proved that a cognovit was taken on the first January 1844, through the intervention of a different attorney, without stay of judgment or execution. That when the attorney took the cognovit at suit of this defendant, he had heard of the cognovit which Gillespie had previously on the same day given to the Messrs. Workman; that he spoke to their attorney before he took this cognovit, expressing doubts whether he could properly take a cognovit from Gillespie as he was understood to be at that time a prisoner under a criminal charge. There was no evidence whatever adduced to shew that the cognovit was given in this case voluntarily for the purpose of giving preference, and in contemplation of bankruptcy; but the plaintiff relied wholly upon the point that the confessing judgment to the Messrs. Workman, was under the circumstances, an act of bankruptcy, and that this defendant had notice of it through his attorney, when the cognovit at his suit was taken. Upon a charge of the learned judge which seems to have been founded in some measure on a misapprehension at the moment, of the legal effect of the facts proved, a verdict was found for the plaintiff for £102 10*s.* 2*d.*

In McGlashan's case the plaintiff also sues in assumpsit for money had and received. Defendant pleads, first, general issue; second, that Gillespie committed no act of bankruptcy, before the issuing of the fiat, &c., under which plaintiff claims as assignee; thirdly, that plaintiff is not assignee. Plaintiff replies that Gillespie committed an act of bankruptcy on 26th April last. The cognovit was taken in this case on the 2nd January 1844, and judgment entered on the same day. It was admitted in this case, that the cognovit was given at defendant's instance, and there was no evidence to shew that he knew of any prior cognovit having been given when he took his. The learned judge told the jury that he saw no evidence whatever of the cognovit in this case having been given voluntarily, and in contemplation of bankruptcy, in order to give a preference over other creditors, and charged for the defendants. The jury, however, found for the plaintiff £133 4*s.* 7*d.* damages.

In the last two cases, *Blake* for defendants, moved against the verdict as being contrary to law and evidence, and for misdirection.

In the case against the Workmans, *Crooks* for the plaintiff moved for a new trial on the same grounds.

Hagarty for the defendants, Workmans.—The second section of the bankrupt act declares what shall be deemed to be acts of bankruptcy, and

the only part of that section under which the plaintiff can charge Gillespie with an act of bankruptcy, so as to recover in this action, is that part which says that "every such trader who shall willingly or fraudulently procure his goods or chattels, debts or credits, lands or tenements, to be attached, distrained, sequestered or taken in execution, shall be deemed to have thereby committed an act of bankruptcy." The mere act of confessing judgment is not made an act of bankruptcy, and yet it is upon that act only that the plaintiff can rely here, as there is no other ground upon which there is a pretence for recovery. The nineteenth section of the act makes conveyances, agreements and securities so given for the purpose of undue preference, or in contemplation of bankruptcy, void in certain cases; with a proviso, that "all dealings and transactions by and with any bankrupt *bonâ fide* made and entered into more than thirty days before the issuing of the commission against him, shall not be invalidated or affected by the act, if there were no notice of a prior act of bankruptcy;" and by the thirty-seventh section, "all executions against the lands and tenements, goods and chattels of such bankrupt, *bonâ fide* executed and levied before the date of such commission, shall be valid, notwithstanding any act of bankruptcy by him committed: Provided the person so dealing with such bankrupt, or at whose suit, or on whose account such execution issued, had not at the time of levying such execution, notice of any act of bankruptcy before then committed by such bankrupt." The bankrupt must have procured his goods to have been taken in execution *willingly or fraudulently*; now where is the proof of the willingness? it cannot be said that he was not pressed by the defendants to give them some security, because their attorney demanded a confession from him, and that pressure is sufficient to remove any supposition of a voluntary act; and as the learned judge said that the confession appeared to be voluntary on its face, which certainly was not the case, it would have been for the defendants to complain of a misdirection, rather than the plaintiff. (a) Then if the cognovit was not voluntary, on what ground can it be said to have been fraudulent. If giving a confession of judgment payable immediately, is to be always taken as indicative of fraud, then I suppose fraud must be presumed here; but there is nothing to establish such a principle, and the analogy that might be drawn from the case of warrants of attorney under the English bankrupt acts does not apply, because no mention is made of warrants of attorney in our act; and it must be considered that they were purposely omitted from the act by the legislature. There is no doubt that the defendants were *bonâ fide* creditors of the bankrupt, and the money now sought to be recovered was levied and paid over to them long before the commission issued under which the plaintiff acts. If there were any misdirection, it was not in favour of the defendants, the case went to the jury more strongly against them, than for them; and the authorities shew clearly, that if the verdict had been for the plaintiff, upon the charge of the learned judge, the defendants would have been entitled to relief. (b)

(a) Arch. Bank. Law, 10 Ed. 44; 7 B. & C. 534; 4 B. & Al. 482; 7 East. 143; 11 East. 261; 2 B. & P. 584; 6 T. R. 152; 3 M. & Scott, 127; 1 Ad. & El. 460; 5 B. & Ad. 289.

(b) 2 Scott, 370, 656; 3 Scott, 229; 4 Scott, 127; 8 Scott. 177; 8 Jurist, 697.

R. B. Sullivan, and *Crooks*, for the plaintiff.—The defendants' counsel has omitted to argue upon an important point in this confession of judgment, which brings the case within the part of the second section of the act to which he has referred. It is declared that a *willing or fraudulent* procuring of goods to be taken in execution shall be deemed to be an act of bankruptcy; and this confession, by its very terms, comes within the section. The facts proved, shew that it was not the intention of the trader to continue in business; he knew that his affairs were in such a hopeless position that they could not be retrieved, and with that knowledge, he executed this cognovit, payable at once; and this act can receive no other construction than that it was done in contemplation of bankruptcy, and for the purpose of procuring his goods to be taken in execution. Had the confession been payable at a distant or future day, it might have received a different construction; because the time that was allowed might have enabled the trader to pay the money without any necessity for enforcing the cognovit; but it is impossible that there could have been any hope of that kind here. The trader believing that he was irretrievably ruined, was willing that his confession should be taken, and by means of it, and the fact appearing on the face of the instrument itself, he willingly procured his goods to be taken in execution, and the moment they were taken in execution by relation back, the confession of judgment showed that he had committed an act of bankruptcy. [C. J.—Would not that argument apply equally if there were no subsequent seizure in execution?] The seizure must refer back to the cognovit, and that being void in itself, merely because it was an act of bankruptcy to give it, the money realized on the execution under it afterwards must be brought back to the bankrupt's estate. If it should be contended that the mere fact of the cognovit being taken payable immediately cannot constitute an act of bankruptcy, still the plaintiff has a right to complain of misdirection, as the learned judge at the trial should have left it to the jury to say, whether the cognovit was given in order that the goods might be seized, or whether the trader intended to pay the debt under it without any seizure. It is not necessary to constitute an act of bankruptcy, that a creditor should be delayed; if it is the natural consequence of the act, it is sufficient. (a)

Blake for McDonald and McGlashan.—The plaintiff was bound to prove both an act of bankruptcy, and that the defendants' executions were avoided by it. It would not be sufficient merely to shew that the confession of judgment was voluntary, but it must also be shewn that it was given in contemplation of bankruptcy. The direction of the learned judge in the suits against McDonald and McGlashan was wrong. [JONES, J.—My impression was, that the giving of the confession was a voluntary act, but that it was not in contemplation of bankruptcy, and I think that there was a misapprehension on my part on that point.] If there was a wrong direction on either point, the defendants ought to obtain a new trial. The confession ought not to have been assumed to be voluntary, it was for the jury to pronounce upon that as a fact, and even although the charge was clearly correct in law, if it were calculated to mislead the jury, the verdict will not be allowed to stand. (b) The argument of the plaintiff's counsel

(a) 1 Camp. 279; 3 Camp. 530; 1 Stark, 88; 7 Bing. 217; 1 C. & M. 258.

(b) 6 Scott, N. R. 34.

is fallacious ; the statute does not make the voluntary giving of a confession an act of bankruptcy ; it is the voluntary procuring the goods to be taken in execution that the statute aims at. To sustain the argument, it must follow of necessity that the giving of the confession is the procuring of the seizure of the goods ; but the confession may be paid without seizure, or it may be the intention of the party to pay ; and if the question of intention can come in at all, then clearly the giving of the confession cannot be looked upon as conclusive evidence of the act of bankruptcy, because the opinion of the jury must be taken what the intention of the party really was. The confession of judgment here was not a voluntary act, it was given under pressure, and the jury should have been so directed ; had they been so directed their verdict would most probably have been for the defendants. As it is, upon the statement of the learned judge, that he told the jury that he thought the confession voluntary, but not in contemplation of bankruptcy, the defendants are entitled to a new trial.

ROBINSON, C. J.—We are all clearly of opinion, that the rule for a new trial in the case against Workman, should be discharged, the verdict being right upon the evidence, and that in the other two cases, those against McDonell and against McGlashan, the rules should be made absolute without costs. In that against McDonell, which was first tried, there was some want of accuracy in the view of the case given to the jury upon the trial. In the hurry of the moment, the effect of the confession being voluntary, seems to have been misconceived by the learned judge. This may or may not have misled them. It is uncertain that it did because in the next case, where it was put to them more clearly and precisely, they nevertheless, found against the learned judge's direction, and that not in a doubtful point. I mean where the evidence was not conflicting, or of a doubtful character. When Messrs. Workmans took their confession through their attorney, there was no idea of the actual bankruptcy of Gillespie, as an event likely to occur. There had never been, up to that time, a bankrupt properly speaking, in the province. The statute that introduced the system, had passed but a few days before. We had not seen it, and how little likely is it that these parties in the country were, under such circumstances, acting with a view to it. Still they might have heard of it, and that might possibly have stimulated them, Messrs. Workman, to proceed, but there is no proof whatever of their acting under such a motive, nor would it matter if they did. Hearing that their debtor had fallen into difficulty on some criminal charge, they probably feared his creditors would press him, and were therefore on the alert : they instruct their attorney in the common way, to press for payment or security, he calls on the debtor and urges him. To avoid an action, the debtor confesses judgment without stay of proceeding, and judgment is entered, execution taken out and the goods sold, and all this before a commission of bankruptcy was applied for, or any step taken towards it. The plaintiffs, in order to support their claim as assignees to take out of the defendant's hands the proceeds of their execution, plead that Gillespie confessed judgment to them voluntarily and fraudulently in contemplation of bankruptcy, in order to give them a preference over other creditors. It was necessary they should plead this, for it is only on such grounds that they can claim to deprive the defendants of the fruits of their judgment. Then it was equally necessary they

should prove what they have pleaded, and they failed in both particulars. They did not show that Gillespie voluntarily procured his goods to be taken in execution, for he did not seek these creditors in order to make them take this cognovit; they sent an attorney to him and pressed him, and he only signed a confession for a debt which he truly owed. There was no evidence whatever that bankruptcy was contemplated, nor that there was any design or wish on Gillespie's part to give a preference for any purpose of his own, nor was there shewn any ground for the assertion that the Messrs. Workman had notice of an act of bankruptcy before committed. In the other cases, the same arguments apply, except that the confessions of judgment on which they obtained their executions were taken after Gillespie had given a cognovit to the Messrs. Workman, but unless the bare fact of giving a cognovit for a just debt to a creditor who was pressed for it constitutes of course an act of bankruptcy, there can be no difference in these cases. Taking into consideration the 2nd, 19th, and 37th clauses of the statute 7 Vic. c. 10, it is clear I think that there is no ground for holding that an act of bankruptcy. It does not constitute bankruptcy under the 2nd clause, while these defendants rights are clearly protected, acting, as for all that appears they did, *bonâ fide* under the 19th clause. There was really no evidence whatever tending to shew that any one of these cognovits was given in contemplation of bankruptcy in the sense in which that term is to be understood, according to all the decisions which have taken place on that point, and it is hardly in the nature of cognovits, considering the circumstances, that they should have been. Where fraud is imputed, there should be clear evidence, certainly strong evidence, to prove it; here there was none.

JONES, J., concurred.

MCLEAN, J.—These actions are brought by plaintiff as assignee of one Gillespie, a bankrupt, for the purpose of recovering from defendants certain monies received by them on executions against Gillespie at their respective suits. A verdict was rendered for the plaintiff in each of the two last named suits, and for the defendant in the first, and new trials are moved for by the defendant in the last cases, and by the plaintiff in the first. The plaintiff contends that the confessions of judgment obtained by the defendants in their several cases were voluntary, and given in contemplation of bankruptcy, and for the purpose of giving the defendants a preference and priority over the general creditors of Gillespie, now a bankrupt, and that therefore the confessions are void and fraudulent under the 19th clause of the Provincial Bankrupt Act, and the defendants liable to him as assignee for the several sums received by them. The evidence in all the cases was the same, and it appeared that in all of them the bankrupt, Gillespie, gave the confessions not voluntarily, but after being pressed and urged to do so by the defendants or their attorney; and that up to the time of giving the confessions he was carrying on his business as a shopkeeper, and in possession of goods to a considerable amount at Oshawa, and no act of bankruptcy was shewn to have been committed by him up to that time. The plaintiff contends that the giving of a confession without any stay of execution must be regarded as wilfully or fraudulently procuring his goods and chattels to be taken in execution, and therefore an act of bankruptcy in each case on the part of Gillespie, which must render void the confessions. There is nothing in

the evidence to shew, that up to the giving of the confessions any of the defendants were aware of any act of bankruptcy committed by Gillespie, or that he had in contemplation to become a bankrupt, and there is no reason to doubt that the several debts claimed were bona fide due to the defendants from Gillespie. Unless therefore the several confessions can be regarded as acts of bankruptcy, I cannot see how the defendants can be held responsible for the several sums received by them on their respective executions. Now, there is not any testimony to shew that the defendants were acquainted with Gillespie's circumstances, or whether he had or had not sufficient means to pay all his creditors. They severally pressed for payment of their accounts, and as he could not meet them, they urged him to give and he did give them confessions of judgment, but at that time, for aught that appears, he was carrying on his business, possessed of property of considerable value, and the defendants may not in fact have been aware that Gillespie owed anything to other creditors. In the case of *Thompson v. Freeman*, 1 T. R. 157, it is laid down by Lord Mansfield, and the same doctrine is upheld in many other cases, "that a bankrupt, when in contemplation of his bankruptcy, cannot by his voluntary act favour any one creditor, but if under fear of legal process he gives a preference, it is evidence that he does not do it voluntarily." The same rule holds where a preference is given to an importunate and urgent creditor, who at the time has not any notice of any act of bankruptcy, or that bankruptcy was in contemplation. The confessions in these cases cannot be considered as voluntarily given by Gillespie, and certainly not with a view willingly or fraudulently to *procure* his goods and chattels to be taken in execution. He must of course have known that they would be liable to be taken, but no arrangement or understanding is shewn to have existed that they should be taken. Under these circumstances, I am of opinion that the confessions did not amount to acts of bankruptcy; that they were good between the parties when given, and that the executions having been levied and the proceeds paid over to defendants on the 1st of March, the plaintiff cannot claim any right either to the goods or the proceeds under the commission issued against Gillespie on the 26th April following. The verdict for the defendant Workman must therefore stand, and new trials be granted in the cases against McDonell and McGlashan.

Rule in Workman's case discharged with costs.

In the other two cases, Rules absolute for new trial, without costs.

MITCHELL v. JENNINGS.

A promissory note is *prima facie* evidence of a settlement of accounts between the maker and the payee, up to the time of giving it.

The plaintiff sued the defendant on a promissory note made by him. The defendant offered evidence of a set-off, on a cause of action which accrued before the making of the note. The learned judge ruled that, *prima facie*, the note must be taken as evidence that, at the time of giving it, the defendant was debtor to the plaintiff, and that antecedent claims would be supposed to have been settled, unless the contrary should be shown; and on this ruling, as the defendant gave no proof on this point,

the plaintiff had a verdict. The defendant moved for a new trial on the law and evidence, and for misdirection, and filed affidavits, which were answered by the plaintiff.

Crawford for the plaintiff.

J. Duggan for the defendant.

ROBINSON, C. J.—I am of opinion that the learned judge ruled correctly, in holding that, *prima facie*, a note is evidence of a settlement of accounts between the maker and payee, up to the time of giving it, otherwise it would not be evidence under the common count for an account stated, but it is constantly received as such. The inference, no doubt, may be repelled by evidence, but it was not in this case, and the plaintiff's affidavit in direct terms contradicts the defendant's statement, that the claim, which he sought to set off, had not been taken into account between them, and allowed as a credit when the note was given; it affirms, in positive terms, that it was.

JONES, J.—A promissory note from one party to another is *prima facie* evidence of a settlement of all preceding accounts; if it is an isolated transaction, and not the result of an account stated, it is for the party setting up a claim anterior to the date of the note to show it; the direction of the learned judge, at the trial, was therefore correct. The affidavit of the defendant, upon which the rule was granted, is not supported, and the facts are denied by the affidavit of the plaintiff: and the defendant does not shew that he can give any other evidence, upon another trial, than that which was received upon the last.

MCLEAN, J., concurred.

Rule discharged, with costs.

BRADBURY v. ADAMS AND GRAHAM.

The sureties of a sheriff, are not liable under their covenant given in accordance with the terms of 3 Will. IV. ch. 8, as for wilful misconduct on the part of the sheriff, where that misconduct consists in a mere error in judgment in deciding *bona fide* upon the priority of writs of execution placed in his hands.

This was an action brought against the late sheriff of the Bathurst District and his sureties, alleging a breach of duty in the late sheriff, in falsely returning to a writ of *fieri facias* against the lands of one Reid, that he had sold to a certain amount, and that Reid had no more lands, &c. The defendants pleaded that the sheriff did not wilfully misconduct himself to the plaintiff's prejudice, contrary to his covenant, &c. This action was brought in August, 1841, and there is a suggestion on the record of the sheriff's having died in July, 1843. It was proved at the trial, that the plaintiff obtained a judgment in the District Court against Reid, in November, 1837, and took out execution, *fi. fa.*, against lands, in October, 1838, returned in August 1840, that the sheriff had seized lands to the value of 9*l. 5s.*, and that there were no lands besides. The sale on which this return was made, was in March, 1840. In July, 1840, another sale of Reid's lands was made, on a writ of *fi. fa.*, at the suit of Shuter et al., which had been in the sheriff's hands ever since March, 1836, or rather, that writ was returned and a writ of *venditioni exponas* issued on it on 31st March, 1840, upon which the sale in July was made. It was

proved that the lands sold in July, 1840, had been advertised for sale in February, 1837, upon Shuter's writ, though never actually sold before July, 1840, when they were sold upon advertisements which mentioned both the plaintiff's writ and Shuter's. The sale advertised in February, 1837, upon Shuter's writ, was postponed for some cause not explained at the trial, and it was not shewn why any further proceeding on that writ had been so long delayed, except that it was proved, by Shuter's attorney, that after he had directed the sheriff to seize Reid's lands, in 1837, it was proposed to him by Reid, to take the lands at the price which he had given for them, but the attorney referred him to his clients, and agreed to wait till he could see them. It laid over not pressed until he heard that the lands had been advertised for sale on Bradbury's later writ, and then the attorney insisted that the sheriff should give priority to Shuter's writ. The sheriff then made a return that he had seized lands which remained unsold for want of bidders, and a venditioni exponas was taken out, which writ, with Bradbury's, was in the sheriff's hands when the lands were sold, in July, 1840. The Chief Justice directed the jury that they should find a verdict for the defendants, for he thought that although the sheriff, if he were living, might be liable to Bradbury for giving preference to Shuter, yet, if he acted for the best, and following his sense of duty, paid over all the money he had collected to that creditor whom he believed to be legally entitled; in other words, if he acted in good faith, though he might have erred in judgment, his sureties would not be liable upon their covenant given under the statute, for that expressly makes the sureties only liable for the sheriff's misconduct. There was no question about the small sum made in March, 1840, upon the sale which took place upon the plaintiff's writ only, because it was clearly shewn that it was discovered, after the sale, that Reid had no title to the lands sold, and nothing was in fact made upon that sale. The jury found a verdict for the defendants, and the plaintiff moved for a new trial, for misdirection.

R. B. Sullivan for the defendants.—It could never have been intended that the sureties should be liable under circumstances like the present. The sheriff was guilty of no wilful misconduct in making the return complained of, it was only an error in judgment; and however the sheriff might have been liable for it personally, it does not follow that the sureties are responsible, or that the default of the sheriff is brought within the terms of their covenant.

Wilson, for the plaintiff.—It was a wilful misconduct in the sheriff to have made the return he did, and for such misconduct, his sureties ought to be held liable. If this default be not within the covenant, it will be difficult to determine in what cases the sureties can be held responsible where the neglect of the sheriff is the cause of complaint.

ROBINSON, C. J.—I continue to be of the opinion that I expressed at the trial, and therefore think that the rule ought to be discharged.

JONES, J.—The question of misdirection to the jury depends upon the construction to be put upon the act 3d. Will. IV. ch. 8. By the second section the sheriff is to provide sureties who, together with himself, shall enter into a covenant according to the form given in the schedule of the act, which shall be available to, and may be sued upon by any person suffering damages by the *default* or *wilful misconduct* of the sheriff. The undertaking of the sureties, according to the form, is, that the sheriff shall

pay over all monies received by virtue of his office, and that neither he, nor his deputy, shall *wilfully misconduct* himself in his office; and the nature of the liability is declared by the 21st section to be to indemnify against any omission or default of the sheriff in not paying over monies received by him, and against damages sustained in consequence of his wilful or negligent misconduct in his office. The act for which the indemnity is claimed in this case, is for giving priority to another execution creditor. This, it appears to me, is rather in the nature of a judicial act, for which the surety would not be held liable. It is not a negligent or wilful act, but if priority were given to another, instead of to the plaintiff, innocently, it was an error of judgment, and not a mere ministerial act which might have been negligently performed, or by the performance of which, in an illegal manner, the sheriff wilfully misconducted himself. Before this act was passed, no security was required to be given by the sheriff, and the legislature very properly enacted that security should be given by sheriffs for the punctual payment of all monies by them collected, and also, indemnity against their negligent or wilful misconduct; but they did not, nor could it be conceived proper that they should be compelled to give security for errors in judgment. The direction, I think, was right; and therefore the rule should be discharged with costs.

MCLEAN, J., concurred.

Rule discharged, with costs.

HUTT v. GILLELAND.

HUTT v. KEITH.

Where after proceedings have been commenced on a replevin bond, the parties to the replevin go to arbitration without the consent of the surety, all further proceedings against the surety will be stayed; *aliter*, where the reference to arbitration takes place with his assent.

In both these cases the defendants moved to stay proceedings. They are actions on replevin bonds, and the defendants moved on the ground that in the action of replevin, the parties, the plaintiff and defendant, without their consent or privity, referred the case to arbitration; by which they contend they are discharged, as the plaintiff in replevin has thereby disabled himself, and with the assent of the other party, from prosecuting his action strictly in the terms of the condition of the replevin bond. The plaintiff's attorney, in the action against Keith, filed an affidavit stating his belief merely that Keith was aware of the reference, and assenting to it. In the action against Gilleland, it appeared clearly, on several affidavits filed, that he was fully concurring in the reference to arbitration; and, that he appeared before the arbitrators, and managed the case as agent for the defendant in replevin, who had removed from the district.

Eccles, for defendants.

E. C. Campbell, for plaintiffs.

ROBINSON, C. J.—We are of opinion that the rule must be discharged in the case against Gilleland, whose assent to the reference is shewn, and not denied; and, as he has made a groundless application, it must be

discharged with costs. (a) In the case against Keith, we make the rule absolute, because we cannot take the assertion of a mere belief that he was concurring, without any thing positive being either shewn or alleged, in opposition to his denial; and it is now clearly settled by the judgments given in Bowmaker et al. v. Sheriff et al., (b) and recognised as authority in Archer v. Hale, (c) that a reference of the action in replevin to arbitration, without the concurrence of the surety, discharges the surety; not indeed that it may be pleaded in discharge, (d) but, that the court will, on such an application as is here made, stay proceedings; and with regard to costs, as the defendant succeeded on the demurrer to the declaration, and as he is entitled to his costs in the action from the other party, on that ground, we cannot make the payment of the costs a condition of staying proceedings; and therefore necessarily make absolute the rule for staying proceedings.

JONES, J., and MCLEAN, J., concurred.

Rule discharged as to Gilleland, with costs, and absolute as to Keth.

HALES v. TRACEY.

The seizure and levy in execution under the bankrupt act, 7 Vic. ch. 10, sec. 37, to avoid the effect of a commission of bankruptcy subsequently issued, mean only the seizure of the goods, and not the actual levying of the money thereout.

A rule nisi made returnable into the full court from the practice court, had been obtained in this case by *Phillpotts*, under the interpleader act, calling on the plaintiff and John Patton, assignee of the defendant, a bankrupt, to appear in court, &c., and to state the nature and particulars of their respective claims to the property seized under execution in this cause, and to maintain or relinquish their claims; and to shew cause why the court should not interfere for the relief of the sheriff who seized the property, under the writ, and make such order as the facts might warrant, and that in the meantime all proceedings on the *fi. fa.*, and the rule to return the same, be stayed. The sheriff seized the defendant's goods under the *fi. fa.*, on the 2nd May, 1844. On the 7th May, the defendant sent him a declaration of his insolvency, and the sheriff delayed proceeding further, but being afterwards informed that it was not intended to sue out a commission of bankruptcy, he advertised the goods for sale on the 4th of June, but no one appearing to bid, they were not sold. On the same day, 4th June, a commission of bankruptcy was sued out and sent to the sheriff, who applied to the plaintiff's attorney to indemnify him, but he declined; and he has in consequence applied under the interpleader act, for the direction of the court. The assignee was appointed on the 26th July last, and has made a claim on the sheriff for the goods. On the part of the plaintiff, it is sworn that his agent went to Prescott on the 4th of June, to bid at the sale, but that he saw no attempt made to sell the goods, and believed there was none; that the deputy sheriff told him at the time that a creditor of the defendant had threatened to make him a bankrupt if the goods were sold; that the deputy sheriff, on that intimation,

(a) 6 Dowl. 136.
(c) 4 Bing. 464.

(b) 3 Price. 214.
(d) 10 Bing. 118.

declined to sell, and returned to Brockville; and that on the same day, after his return, the commission of bankruptcy was sued out.

Phillpotts now contended that the sheriff ought to be relieved. He had seized the goods, but he was in doubt whether, under the circumstances, he had the power to sell; and if he did sell, whether he should pay over the proceeds of the sale to the plaintiff, or to the assignee of the bankrupt. The difficulty arose in consequence of the wording of section 37, of the bankrupt act, and it was doubtful whether the word *levied* used in that section meant merely the seizure of the goods, or the making the money thereout; and it was upon that point that the application was made.

Campbell, for the plaintiff, shewed cause, and cited *Wray v. Lord Egremont*, (a) as in point.

ROBINSON, C. J.—It is quite clear, upon these facts, this rule which the sheriff has obtained must be discharged. Our bankrupt act clearly entitles a party to proceed with his execution, if a levy has been made under it before any notice of the bankruptcy. (b) *Wray v. Lord Egremont*, (a) shews that the same construction was placed on the old bankruptcy act of James I., where the form of expression was similar. Execution is regarded in law as one act, and if it is rightly commenced it may be carried to an end. In the latter part of the clause the word *levy* is used alone, making the act of levying enough to prevent the title of the assignees attaching under a commission issued afterwards, by reason of bankruptcy, of which the party had no notice before the levy. The sheriff, having made an application clearly without ground, must pay the costs, so far as the plaintiff in the *f. fa.* is concerned; but not the costs of the assignee, whom he has brought into court, for the expense has been occasioned in the hope of adding to the funds of the bankrupt's estate, to the prejudice of this plaintiff. (c)

JONES, J., and *MCLEAN, J.*, concurred.

Rule discharged.

McDONELL *v. Cook*.

Where the plaintiff had been employed by A. in getting out timber, which A. afterwards sold to the defendant, who agreed verbally with the plaintiff, and others who had been working with him, the timber being in their possession, that he would pay the wages of the plaintiff, and the others, if they would assist in rafting the timber to Quebec, out of the proceeds of its sale there: Held, that on shewing the sale there the plaintiff was entitled to recover for his wages as money had and received; and, that the case was not within the statute of frauds.

The plaintiff sued in assumpsit, for work and labour, for money had and received, and on an account stated. The defendant pleaded to the first count, payment of part, and non assumpsit to the residue; and, to the two other counts, he pleaded a set-off only. It was an action brought by a person who had been employed as a labourer in getting out lumber, and in assisting to transport it to market. The lumber had been made and got out by one Simmons, who had contracted with the defendant to get out the lumber at his own expense, and deliver it to the defendant at the

(a) 4 B. & Ad. 122.

(b) Statutes of Canada, 7 Vic. c. 10, s. 37.

(c) 2 Dowl. 166; 3 Dowl. 180; 6 Dowl. 136.

falls on the Petite Nation River, at a certain price. When the defendant came there to take a delivery of the timber, and was about to have it marked in his name, the hired men, of whom the plaintiff was one, insisted on knowing to whom they were to look for their wages, and refused to allow him to take possession of the timber, till they were satisfied on that point. They asserted that Simmons was pledged to them to pay them their wages out of the proceeds of the lumber, when he got it to Quebec; and they insisted that if the defendant were to come in his place, and take them with the raft, as Simmons was to have done, that he should not only engage to pay them the wages agreed upon for the time they should be in his service, but also the back wages earned by them in getting out the timber, while they were in the employment of Simmons. It was proved that the defendant readily and fully agreed to do this, in the presence of the men, and of Simmons; and it was proved further, by the defendant's agent, whom the defendant called as a witness at the trial, that such an arrangement was in accordance with the usual course of the lumber trade, the men always claiming and expecting, under all the circumstances, to be paid their wages out of the proceeds of the lumber when sold at Quebec or Montreal; and it was distinctly proved in this case, that the defendant took the lumber at the Falls, on the understanding that the men were to continue with the raft till they got it to market; that he was to pay them certain wages per month for their service to be rendered, and to pay them also *all arrears* of wages due to them, on the sale of the raft. It was objected that this was an agreement to pay the debt of another, so far as the wages earned in Simmons' service were concerned, and required evidence of an agreement in writing under the statute of frauds. It was only this portion of the wages that was in question, the other part of the demand had been paid. The Chief Justice ruled at the trial, that if the jury were satisfied that, according to the usage in this description of business, upon a transfer of lumber on its way to market, the men are understood to retain a claim upon the proceeds when sold, and are to be first paid, then all persons must be supposed to contract in the trade with a view to this usage, and to intend to abide by it, unless the contrary is shewn; that here, it was shewn that the contract was in fact in accordance with that usage. It then became part of the terms between Simmons and Cook, that the latter should pay the men's wages, and must be supposed to have entered into the consideration of the bargain, and the consequence would be that, when Cook sold the raft and received its price, he held so much of the money not as his own, but to the use of the men having, by his admission, a right to claim it. It was not an independent undertaking to pay the debt of another; it became a debt that Cook owed to the men, as soon as he had turned the raft into money. The jury gave a verdict for the plaintiff for £23 12s. 6d., the amount of wages shown to be due by Simmons, it being agreed at the trial, that whatever could be afterwards shown, by the books, to have been paid to the plaintiff on account of his wages on Simmons's orders, should be afterwards deducted.

Vankoughnet for the defendant, obtained a rule nisi, for a new trial, on the law and evidence, and for misdirection.

J. Hillyard Cameron shewed cause. The defendant objects that the agreement made with the plaintiff is void by the statute of frauds, but

it is not a case coming within that statute as a promise to pay the debt of another; it is a new promise by the defendant, founded on a good consideration, and although its fulfilment includes the payment of the wages due to the plaintiff by the person by whom he was originally employed, the nature of the promise itself is not thereby altered. The plaintiff and his fellow workmen might have retained the possession of the timber, which had been sold to the defendant, until their wages were paid, and the defendant being aware of that, agreed with them that if they would assist in rafting it to market, he would, on its sale, pay their wages out of the proceeds; this was a direct promise to the plaintiff founded on a sufficient consideration, and was not within the statute of frauds. But the defendant is not at liberty to urge this objection on the pleadings in the cause, supposing that it were available otherwise. He has not denied the assumpsit on the counts for money had and received, and the account stated, and any defence of a void contract is not open to him. It is on these counts, a mere question of amount of damages; it must be admitted that the plaintiff is entitled at least to nominal damages, as no attempt was made at the trial to establish a set-off, which formed the subject of the only plea that was pleaded to these two counts, and there was quite sufficient evidence to warrant the jury in finding for the plaintiff the amount for which they gave their verdict. The justice of the case seems clearly with the plaintiff, and the law is certainly not against him.

Vankoughnet in support of the rule. The case is within the statute of frauds, as a promise to pay the debt of another. If the plaintiff and the other workmen had a lien upon the timber, so that they might have legally held it for the amount of their wages against the purchaser, then the case would have stood on a different footing, as in parting with their lien to the defendant, they were giving up a right, and offering a good consideration for the defendant's promise; but there is no such legal lien, as they contend for, and as the evidence does not establish a lien by agreement, the defendant's promise was void, as a verbal agreement to pay the debt of another. It is true that the plaintiff must recover nominal damages on these counts, but he can obtain nothing more, as there is no sufficient evidence to establish any specific sum against the defendant.

ROBINSON, C. J.—This case was tried before me at Cornwall. My learned brothers take the same view as I then did of the legal effect of the evidence. It did not then, I think, occur to me to notice what has been mentioned in the argument of the rule moved against the verdict, that the assumpsit is not denied as regards the two last counts, a set-off only being pleaded to them; that a contract being admitted, of course a binding contract, neither the statute of frauds being pleaded, nor the general issue, the plaintiff was clearly entitled to a verdict on those counts, if only for nominal damages. This point would alone be decisive. By not denying the assumpsit stated in the count for money had and received, but pleading only a set-off, the defendant agreed that the plaintiff has a good cause of action on that count, and was entitled to recover at least some damages. He proved no set-off, and we should, therefore, not set aside this small verdict, which is clearly a just one. I am further of opinion, however, that the case is not within the statute of frauds. The defendant got the timber on the express understanding, according to the evidence of several witnesses, that he would pay the hands, as Simmons had engaged to do,

out of the proceeds of the raft. It must be supposed that, among men of business, such a condition must necessarily enter into and affect the amount of money which he was to pay Simmons; that is, that he would withhold enough money to pay the men's accounts which had been furnished to him; and moreover, it must be looked upon as part of the conditions on which he engaged the men to continue on the raft, and take it to Montreal. It was not a mere collateral undertaking to pay the debt of another, he had made the debt his own, upon a new consideration; and when he sold the raft, and received the price, he held in his hands for the plaintiff, as his money, so much as was necessary to pay his wages; the timber had passed into his hands on that condition. It was surmised rather than proved, on the trial, that the timber did not sell for as much as would enable the defendant to pay all the wages and expenses; but it was left quite uncertain whether any and what amount was deficient. I could only leave that point to the jury, upon the evidence as it was given. We cannot properly set aside the verdict.

JONES, J.—The defendant was permitted, by the plaintiff and others, to take possession of the timber upon which the plaintiff had, or claimed to have, a lien for his work; promising to pay the amount due to the plaintiff, for his work on the timber, when it should be sold at Quebec. It was proved that the defendant sold the timber in the Quebec market, and received the proceeds. I think this action, for money had and received to the use of the plaintiff, is sustainable; and that the case does not come within the statute of frauds, as being a promise to pay the debt of a third person, requiring a note in writing.

MCLEAN, J.—It is admitted by the counsel for the defendant, that the plaintiff is entitled to retain a verdict on the 2nd and 3rd counts, which are for money had and received, and on an account stated; and the only question is, whether that verdict should be for the damages found by the jury, or whether it should be merely nominal damages. By the pleadings the defendant admits money had and received to the plaintiff's use, and an account stated, there being only a set-off pleaded to the 2nd and 3rd counts, and the general issue to the 1st count. The evidence establishes, that the defendant being about to mark some timber purchased by him, or got out for him by one Simmons, the men, in the presence of the defendant and Simmons, objected to the marking and the delivery of the timber to the defendant, unless he would pay them for their labour in getting it out; and it was also proved, that it was customary in such cases for the men to accompany the timber to the market, and to be paid from the proceeds, and that the defendant had promised the men to pay them when the timber should be sold at Quebec. Upon these terms the timber was marked in the defendant's name, and by him brought to market; the plaintiff who had assisted in making it being employed also in assisting to take it down. He was paid for the latter service, but not for his labour in getting it out, and this action is brought for that amount. The defendant endeavoured to shew that the timber did not produce enough to pay the expenses; and from the evidence adduced, there was no doubt the timber had been sold and the proceeds received by the defendant. This being the case, the defendant must be considered as having received so much of the proceeds as were due to the men engaged in making the timber for their use. The undertaking of the

defendant to the men in presence of Simmons, was not without a consideration, as in fact the defendant received timber furnished by the labour of the men, only subject to the condition of his paying them from the proceeds of the timber, at Quebec. I think, under the circumstances, that the action for money had and received, may be maintained against the defendant; and that the rule nisi, to set aside the verdict in this case, must be discharged.

Rule discharged, with costs.

LEY v. MADILL.

An action on the case will lie against a party who has collusively obtained from his debtor a confession of judgment for a larger sum than is really due to him, under which the debtor's property has been sold in execution, at the suit of another creditor of the debtor, who has been injured by these collusive proceedings between the first creditor and the debtor.

This is a special action on the case. The plaintiff declares, by *John Bell*, his attorney, by whom the declaration was drawn, "For that whereas heretofore, to wit, in Michaelmas Term, in the sixth year of the reign of our Sovereign Lady the Queen at Toronto, in the Home District, the said plaintiff impleaded one William Allen, in her said Majesty's Court of Queen's Bench, at Toronto, in a certain action of trespass on the case upon promises, in which said action, the plaintiff claimed damages to the amount of 200*l.* of lawful money of Canada; and thereupon such proceedings were had in the said action that it was considered, by the consideration and judgment of the said court, that the said plaintiff should recover against the said William Allen his damages, to 200*l.*, together with his costs and charges by him about his said suit in that behalf expended, which said damages, costs and charges, in the whole amounted to 203*l. 7s. 2d.*, as by the record and proceedings thereof will more fully appear. And the said plaintiff in fact further saith, that for having execution of the said judgment, he, the said plaintiff, afterwards, to wit, on the 15th day of September, 1842, at Toronto, in the Home District, sued and prosecuted, out of the said court of our Lady the Queen before the Queen herself, upon the said judgment, a certain writ of our said Lady the Queen called a writ of fieri facias, directed to the sheriff of the Home District, against the goods and chattels of the said William Allen, by which said writ our said Lady the Queen commanded the said sheriff that of the goods and chattels of the said William Allen, in his the said sheriff's district, he should cause to be made 203*l. 7s. 2d.*, which the plaintiff then lately, in the said court at Toronto before the Queen herself, had recovered against him for his damages which he had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said William Allen to the said plaintiff, as for his costs and charges by him about his suit in that behalf expended, whereof the said William Allen was convicted as appears to us of record; and that the said sheriff should have that money before our Sovereign Lady the Queen, at Toronto, on the first day of Hilary Term, then next, to render to the said plaintiff, for his damages aforesaid, together with the said writ; which said writ was afterwards, to wit, on the day and year last aforesaid, indorsed with a direction to the said sheriff, to levy and make of the goods and

chattels of the said William Allen in his district, 75*l.* 5*s.* and interest on 67*l.* 10*s.* 6*d.* from the 16th day of September, 1842, the sheriff's own fees and 14*s.* 6*d.* for that writ; and which said writ, so indorsed as aforesaid was afterwards, to wit, on the day and year last aforesaid, delivered to the said sheriff in due form of law to be executed. And the said plaintiff, in fact saith, that the defendant, before the recovery of the said judgment, by the said plaintiff as aforesaid, and before the issuing and delivering of the said writ to the said sheriff, to be executed as aforesaid, craftily, deceitfully, collusively, and fraudulently contriving, and intending to defraud the said plaintiff out of his said monies, by the said writ so directed to be levied as aforesaid, and to prevent the said sheriff of the Home District, from having before our said Lady the Queen, on the said first day of Hilary Term, the money so directed to be made by the said writ, to render the plaintiff as aforesaid, craftily, falsely, collusively, deceitfully and fraudulently did agree with the said William Allen, to implead the said William Allen in a certain action of trespass on the case upon promises; and the said plaintiff in fact further saith, that the said defendant, craftily, falsely, collusively, deceitfully and fraudulently contriving and intending as aforesaid, did heretofore, to wit, in the said Term of Michaelmas, in the sixth year of the reign of our sovereign Lady, the now Queen, at Toronto, in the Home District aforesaid, craftily, falsely, collusively, deceitfully and fraudulently, implead the said William Allen, in the court of our Lady the Queen before the Queen herself, in an action of trespass on the case upon promises, for the recovery of certain damages, by the said defendant then and there craftily, falsely, collusively, deceitfully, and fraudulently pretended to have been sustained by him the said defendant, by reason of the non-performance by the said William Allen of certain promises and undertakings, before then by the said William Allen made to the said defendant, as was by the said defendant then and there craftily, falsely, collusively, deceitfully, and fraudulently alleged; and the said plaintiff, in fact, further saith, that the said defendant, falsely, collusively, deceitfully, and fraudulently contriving and intending as aforesaid, caused such proceedings to be had in the said action of the said defendant against the said William Allen, that afterwards, to wit, during the said Term of Michaelmas, in the sixth year of the reign of our said Lady the Queen, it was by the consideration and judgment of the court of our said Lady the Queen, at Toronto, before the Queen herself, considered that the said defendant should recover against the said William Allen, his damages to £400, and also, £3 7*s.* 2*d.*, for his costs and charges, by the said court there adjudged to the defendant, and with his assent, which said damages, costs and charges, in the whole amounted to £403 7*s.* 2*d.*; and the said plaintiff, in fact, further saith, that the said defendant, having so recovered the said judgment by such false, collusive, deceitful, and fraudulent agreement as aforesaid, he, the said defendant, further contriving and intending as aforesaid, afterwards, to wit, on the sixth day of September, in the year aforesaid, sued and prosecuted out of the court of our said Lady the Queen at Toronto, before the Queen herself, a certain writ of our said Lady the Queen, called a writ of fieri facias, so obtained as aforesaid, directed to the sheriff of the Home District, against the goods and chattels of the said William Allen, upon the said judgment; by which said writ our said Lady the Queen commanded the

said sheriff, that of the goods and chattels of the said William Allen, in his, the said sheriff's district, he should cause to be made the sum of £403 7s. 2d., which the said defendant lately in the said court before our lady the Queen at Toronto, had recovered against the said William Allen for damages which he had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said William Allen to the defendant, as for his costs and charges by him about his suit in that behalf expended, whereof the said Willian Allen was convicted, as appeared of record, and that the said sheriff should have the money before our Lady the Queen, at Toronto, on the first day of Hilary Term, then next, to render to the said defendant for his damages aforesaid, which said writ afterwards to wit, on the day and year last aforesaid, at Toronto, in the district aforesaid, was indorsed with a direction to the said sheriff, to levy and make the sum of £2004 17s. 8d., and interest on £203 7s. 2d., from the day and year last aforesaid, till made, and the said sheriff's own fees, and which said writ, so indorsed, the said defendant, further craftily, deceitfully, collusively and fraudulently contriving and intending as aforesaid, afterwards to wit, on the day and year last aforesaid, at Toronto, in the Home District aforesaid, caused and procured to be delivered to the said sheriff of the Home District, next immedately preceding the said writ of the said plaintiff, in due form of law to be executed. And the said plaintiff further saith, that by virtue of the said writ, so fraudulently issued by the said defendant, against the goods and chattels of the said William Allen, as aforesaid, and before the return thereof, the said sheriff of the Home District seized and took in execution the whole of the goods and chattels of the said William Allen, in his the said sheriff's district, of great value, to wit, of the value of £200 of lawful money of Canada, and levied thereout the money so directed to be made by the said last mentioned writ, and that the said sheriff did so levy the said last mentioned money, whilst the said writ before stated to have been sued out by the said plaintiff, remained in the said sheriff's hands, no way cancelled, made void, or satisfied, and before the same writ was returnable, which said money the said sheriff at the return of the said writ, so fraudulently issued by the defendant, as aforesaid, paid over to the said defendant, and which said money the said defendant then had and received, when in fact and in truth, at the time when the said defendant so recovered the said judgment against the said William Allen, and when the writ of fieri facias upon the same judgment was sued out by the said defendant, against the goods and chattels of the said William Allen, and when the same writ was so indorsed and delivered to the said sheriff of the Home District, as aforesaid, and when the money so by the said sheriff by virtue of the said writ made as aforesaid, was received by the said defendant as aforesaid, the said judgment on the said return of the said defendant was so obtained, and the said writ thereupon issued as aforesaid, and indorsed and delivered to the said sheriff as aforesaid; and the said defendant received the said money as aforesaid craftily, collusively, deceitfully and fraudulently, by the connivance and with the consent of the said William Allen, for the purpose of hindering and preventing the said sheriff of the Home District from having the money so by the said writ sued out by the plaintiff, directed to be made of the goods and chattels of the said William Allen, to render to the said plaintiff, on the first day

of the said then next term of Hilary, without having had, at the time of impleading the said William Allen, in the said action, and obtaining the judgment therein, and suing out the said writ thereupon, and delivering the said writ so indorsed to the sheriff of the Home District, to be executed as aforesaid, any cause of action whatever against the said William Allen; by means whereof, the said defendant collusively, deceitfully and fraudulently hindered and prevented the said sheriff of the Home District from levying the money by the said writ sued out upon the judgment recovered by the said plaintiff against the said William Allen as aforesaid directed to be made. And at the return day of the said last mentioned writ, the said sheriff, by means of the crafty, collusive, fraudulent and deceitful practice by the defendant, was forced and obliged to and did return to the court of our said Lady the Queen, that the said William Allen had not any goods and chattels in his the said sheriff's district, whereof he could cause to be levied the money so by the last mentioned writ by the plaintiff sued out as aforesaid directed to be made, to render to the plaintiff for his damages aforesaid, as by the said last mentioned writ he was commanded; and in consequence thereof, he, the said plaintiff, hath wholly lost and been deprived of the said money, to the plaintiff's damage of 200*l.* The defendant pleads, first, not guilty of the supposed grievances; and secondly, that the judgment obtained by him against Allen was obtained justly, and for a true debt, and not by any fraud or collusion as alleged in the declaration. The judgment against Allen ats. Madill, was proved to have been entered on the 10th of August, 1842, on a cognovit dated the 29th August, 1842; that ats. this plaintiff, to have been entered the 15th of September, 1842, on a cognovit dated the 12th of September, 1842. It was proved that three writs of *fi. fa.* against Allen had come into the sheriff's hands not long before the writ sued out by the defendant; that all Allen's goods were sold under these writs, the plaintiff's writ being then also in the sheriff's hands; that enough money was made to satisfy the three first executions, and about 70*l.* over, which would have been paid over to this plaintiff, if it had not been for the defendant's prior writ. It was proved on the part of the plaintiff, clearly, that the defendant and Allen had both admitted that the debt really due to the defendant was only about 40*l.* or 50*l.*, and that the confession of judgment was taken for 200*l.*, in order to cover the goods for the benefit of Allen and his family, and on the understanding that any balance over the true debt due to Allen, remaining after the sale of the goods, was to be paid to Allen. Allen was called on the defence, and swore that he owed the defendant about 100*l.* when he gave the confession; that he told the defendant if he received more than the sum really due to him, he was to give the surplus to this plaintiff; and that he told this plaintiff, when he confessed judgment to him, that he had before given a cognovit to Madill. No objection was taken at the trial that the action was not sustainable; on the contrary, it was fully admitted by the defendant's counsel, that if the facts were as the plaintiff had alleged, he would be entitled to recover. The learned judge directed the jury, that if they were convinced that the defendant had fraudulently taken a confession of judgment for more than was due, and that the plaintiff had been injured by it, they should give such damages as they found the plaintiff had sustained. They gave a verdict for the plaintiff, and 67*l.* 10*s.* damages.

J. Duggan, for the defendant, having obtained a rule nisi for a new trial on the law and evidence, and also to arrest the judgment,

John Bell shewed cause. The case went fairly to the jury, who, with all the facts before them, found for the plaintiff, and the defendant's counsel did not at the trial take any exception to the declaration, or contend that if the case were established in fact, that the law was against the plaintiff. The damages that were given by the jury were not more than the defendant could be justly called upon to pay, and had they even been greater, his fraudulent acts in the transaction would have well warranted the jury in their finding. The defendant, therefore, ought not to obtain a new trial, nor ought his rule in arrest of judgment to prevail. The plaintiff was not bound to have application made to set aside the defendant's judgment as fraudulent; he might treat it as a nullity, and proceed with his action as if it had never existed, except for the purposes for which his action was brought, and if he could do so, then the declaration is good, and the judgment cannot be arrested. He cited 8 Dowl. & Ry. 442; 5 B. & C. 660.

J. Duggan, in support of the rule. The damages given by the jury are beyond the amount that the plaintiff ought to recover under any circumstances, and if the court should consider the declaration good, the defendant ought to be granted a new trial for excessive damages, particularly as the plaintiff is himself under the evidence shewn to have acted suspiciously in obtaining his judgment, and ought not therefore to be dealt with very favourably. But the declaration can hardly be sustained. It is a novel mode of proceeding, and the plaintiff should have taken steps to have vacated the defendant's judgment, before he adopted it, but as he has not done so, he is now seeking in fact to set aside a judgment of the court in a collateral proceeding, which he cannot produce any precedent for doing. In the absence of authority, and as the pleading seems contrary to principle, the rule to arrest the judgment ought to be made absolute.

ROBINSON, C. J.—In our opinion, the action is well brought. No objection has been taken to the sufficiency of the declaration in point of form, and it seems to have been carefully framed to meet the case; the question, therefore, is the general one, whether for such an injury an action can be maintained. Upon every principle we think it must lie. It was urged that the judgment ought to have been first vacated on the ground of fraud, before it can be taken to be fraudulent, for the purposes of this action; but that clearly is not so. A fraudulent judgment or assignment is absolutely void, and when clearly made out to be fraudulent within the statute 13 Eliz. ch. 5, in order to defeat creditors, it is to be treated as if it never existed (*a*). In actions against sheriffs for false returns, the plaintiff succeeds when he shews that the sheriff has paid over the monies levied by him to a person whose judgment was fraudulent, though the judgment is still unreversed (*b*); that is, when the sheriff had notice that it was intended to be impeached. But there is no question here about notice, for it is the party whose conduct is impeached, and not an innocent third party, that is the defendant in this action. So, when the sheriff is prosecuted for an escape of a debtor in execution, he may

(*a*) 3 M. & S. 371.

(*b*) 5 B. & C. 660.

shew that the judgment was fraudulent. In like manner, when an executor pleads a prior judgment at the suit of another creditor, the plaintiff may shew it to be fraudulently obtained. The sheriff, there can be no doubt, when he has been compelled to pay damages for a false return, in consequence of his having first satisfied an execution that was fraudulent, would have a good remedy against the plaintiff in that fraudulent execution; and what may be done circuitously, may be done directly; instead of suing the sheriff, the person grieved may take his remedy against the party whose deceit has occasioned the injury. The remedy given by the statute 13 Eliz. ch. 5, by subjecting the party obtaining a fraudulent judgment to a penalty, of which half is to go to the party grieved, does not deprive him of any right of action he might otherwise have. With regard to the merits of the case, the evidence well supported the verdict. There may be some appearances of ground for surmising that the plaintiff's confession of judgment was not wholly for a true debt, but was given in some measure for the same improper purpose as the other was proved to have been given, but the case went fairly to the jury; their verdict is not such as we can say was wrong upon the facts proved. With regard to the damages, we should not enter into a very critical examination of them, in such a case, and they seem to be not excessive. If the defendant is made to pay somewhat more than a strict calculation would account for, that is a risk which parties run when they embark in such transactions. We cannot pretend to measure exactly all the consequences of fraud.

Rule discharged.

CANIFFE V. CANIFFE ET AL.

Where in tressass quare clausum fregit, it appeared that the only injury complained of, and the only one in evidence before the jury, was, the destruction in part of a mill dam over the waters of a river, and not on the land included in the description of premises in the declaration: Held, that the verdict found for the plaintiff was incorrect, and a nonsuit was entered.

Trespass quare clausum fregit. First count, for entering into plaintiff's close, being the south part of Lot No. 5, in the 2nd concession of Flamboro', and pulling down a mill dam of the plaintiff's, erected there; second count, for entering the plaintiff's close, being the east half of Lot No. 5, in the 3rd concession of Flamboro', and pulling down the plaintiff's mill dam erected thereon. (Both closes are said to be bordering upon and adjoining the river Moira). The defendants pleaded, first, the general issue; secondly, that the closes mentioned in both counts, were the freehold of the defendant, Daniel Caniffe; and that, because the dam was wrongfully incumbering the closes, Jonas Caniffe, as his servant, entered and pulled them down, &c.; thirdly, that the defendants entered to abate a nuisance, (namely, the plaintiff's dam), which was wrongfully erected on the plaintiff's land, and injuriously threw back the water upon a mill of the defendants' situate on the same stream. The plaintiff to the special pleas replied, that the closes were not the freehold of the defendants; and admitting that the defendants were possessed of the mill, to the flow of the water in its natural channel, yet that they entered the plaintiff's close of their own wrong, and without the cause alleged. It was proved at the trial, that the dam partly destroyed by the defendants, which was the

injury complained of, and the only injury stated to the jury, was over the water of the Moira, and not on the land included in the description of premises in the declaration. The plaintiff endeavoured to support his claim to damages, by shewing, that in order to get to the dam on the occasion of the trespass complained of, the defendants had passed over part of a tract of 25 acres belonging to the plaintiff, and upon this ground he recovered a small verdict of 5*s.*

E. Murney, for the defendants, moved for a nonsuit, on leave reserved at the trial, or for a new trial, on the law and evidence.

Ross shewed cause.

J. Hillyard Cameron supported the rule.

ROBINSON, C. J.—We have carefully examined the evidence given on the trial, and it appears clearly that the objection taken as a ground of nonsuit was well founded. The plaintiff complained only of a trespass in pulling down his mill dam, he went to the jury only upon the statement of that alleged injury as his ground of action, and it was proved beyond doubt, that the mill dam was not on his close, as he stated it to be; the parties went to trial upon that issue, and the defendants were entitled by the evidence to succeed upon it. The plaintiff could not change his ground, and claim damages for another injury, namely the walking over his land to get to the mill dam. And as to the 25 acres spoken of, and for the going upon which the plaintiff endeavoured to support his verdict, the evidence did not shew that to be his freehold, as he alleged, if they were within the premises described in the declaration, which was not clearly made out. On the ground just mentioned, however, we think the plaintiff should have been nonsuited.

Rule absolute.

ABRAMS v. MOON.

Where in trespass for taking the plaintiff's cattle, the defendant pleaded not possessed, and on the trial it was proved that the cattle had belonged to the defendant, and that the plaintiff had leased them with a farm from the defendant, but had detained them after the term had expired, for which the defendant had sued him and recovered damages to the value of the cattle, after this action was brought: Held, that the plaintiff could not treat this verdict as giving him a title to the cattle, by relation back, at the time this action was commenced, but that this defendant was entitled to succeed on his plea of not possessed.

Trespass for taking the plaintiff's cattle and other goods. The defendant pleads, first, the general issue; secondly, that the goods, &c., were not the plaintiff's; and thirdly, that before the said time when, &c., the goods belonged to the defendant, who gave them to Richard Roe, to keep for his use, and that Richard Roe delivered them to the plaintiff, whereupon the defendant, at the time when, &c., took them from the plaintiff, as he lawfully might, &c. The plaintiff joins issue on the first two pleas, and to the third replies, that the defendant, being so possessed of the goods as in his plea mentioned, afterwards, and before the said time when &c., and before this suit, viz. on, &c., sold and delivered them to the plaintiff for a valuable consideration, whereby the plaintiff then became possessed of them as of his own property; and that the defendant afterwards, at the

said time when &c., of his own wrong committed the trespass complained of. The defendant demurs to this replication. At the trial, the jury found a verdict for the plaintiff on the first issue (general issue), and for the defendant on the second, and assessed contingent damages for the plaintiff, on the demurrer, at one shilling. The plaintiff moves to set the verdict aside, for misdirection, and as being contrary to law and evidence. The facts of the case appear in the judgment of the court.

Hagarty, for the defendant.

Crooks, in support of the rule.

ROBINSON, C. J.—There is no doubt, upon the evidence, that the verdict was rightly given for the defendant, upon the second issue, which denies that the goods were the plaintiff's; and this makes an end of the action; the defendant, it seems, had let a farm to the plaintiff, and had let with it, during the term, to be used on the farm, the horses and cattle in question, with other stock. The term expired, and yet the plaintiff insisted on retaining the cattle, which led to the defendant bringing an action against him, which was tried at the same assizes, a few days before this cause, and in which the defendant received a verdict for the value of the cattle. Those now sued for by the plaintiff, were part of the same cattle, which had been placed in the defendant's possession, to keep, by the sheriff, who had seized them on an execution against the plaintiff, and that execution being satisfied, the sheriff had relinquished his claim upon them; and the plaintiff was proceeding to recover them, but the defendant, as the cattle were then in fact his, would not permit him, and forcibly detained them. It was for that detention of the cattle, that this action of trespass was brought. It is clear that then, and when the action was brought, the cattle were the property of the defendant; but the plaintiff contended, that as the defendant had, a few days before the trial, at the same assizes, recovered a verdict for their value, that that made them, by relation as it were, the property of the plaintiff; but the learned judge rightly ruled, that the question upon the issue was, to whom the cattle belonged at the time of the alleged trespass. There was no trespass committed by the defendant in keeping them there, and the plaintiff had no wrong done to him, in having to pay the costs of a groundless action.

Rule discharged, with costs.

A DIGEST
OF
ALL THE REPORTED CASES
DECIDED IN THE
QUEEN'S BENCH AND PRACTICE COURTS,
FROM EASTER TERM, 7 VICTORIA, TO EASTER TERM, 8 VICTORIA,
INCLUSIVE; AND SOME CASES OF AN EARLIER DATE.

ABSCONDING DEBTOR.

Creditors setting aside Proceedings for Irregularity.] Proceedings had in suits against an absconding debtor, contrary to the provisions of the statutes, may be set aside at the instance of other creditors of the absconding debtor.—Montreal Bank v. Burnham, 131.

Priority of Executions.] Where a party sues out process and serves the debtor personally, prior to the issuing of attachments under the Absconding Debtor's Acts, and obtains judgment before the attaching creditor, his execution is entitled to priority.—Bank of British North America v. Jarvis, Sheriff Home District, 182.

Who Considered.] Where a person, usually residing in Scotland, came to Canada to settle some affairs, and while here referred some disputes which had arisen concerning them to arbitration, and an award was made against him which was not payable until nearly two years after he had left the province and returned to Scotland, and he had contracted no debts while here: Held, that he did not come within the Absconding Debtor's Act.—Taylor v. Nicholl, 416.

ACCOUNT STATED.

Evidence of.] A promissory note given to an agent upon a settlement of accounts, may be used as evidence

of an account stated with the person for whom he was acting, when the fact of agency was known to the other party.—Rhodes v. Executors of Crawford, 257.

ACTION.

Notice of, to Revenue Officer.] A party who, acting as a revenue officer or conceiving that he has authority so to act, seizes goods, is entitled to notice before action brought, without the necessity of proving his commission or appointment.—Wadsworth v. Murray, 190.

Want of Notice of, under Division Court Act, must be pleaded.] The want of notice of action in a suit against a bailiff of a Division Court, acting in his office under 4 & 5 Vic. ch. 3, must be pleaded, and cannot be given in evidence under the general issue. But where, under that act, a bailiff seizing and selling goods under an execution, is entitled to notice, the plaintiff in the execution is not, as he is not within the protection of the sixth clause, as "a person acting in the execution of the act."—Timon v. Stubbs and Balfour, 347.

Notice of, how to determine right to.] If an action be brought against a person, who is a magistrate, for an act done, as he alleges, in the execution of his duty, and it be doubtful whether it was so done or not, and no notice of action is proved, it is

proper, in order to determine whether he is entitled to such notice, that it should be left to the jury to say, whether he believed he was acting as a magistrate or not, and if they find in his favour on that point, the verdict must be against the plaintiff.—

Carswell v. Huffman, 381.

AFFIDAVIT.

Style of Cause.] In entitling an affidavit in a cause, the additions of "plaintiff," and "defendant," must be inserted.—Brown v. Simmonds, 280.

Sworn before Partner of Attorney.] An affidavit sworn before the partner of the attorney of the party on whose behalf the affidavit is made, cannot be read.—Hadley v. Hearns et al. 405.

ALIEN.

The son of a woman who was a British subject, but was married to an alien, and domiciled out of the King's allegiance at the time of her son's birth, is not entitled under the Provincial Statute 9 Geo. IV. ch. 21, to inherit land which had been granted to his mother in this province.—Doe dem. Robinson v. Clarke, 37.

AMENDMENT.

After Judgment on Demurrer.] After judgment on demurrer, an amendment will not be allowed unless under very special circumstances, and the motion must be promptly made.—Counter et al. v. Hamilton, 6.

At Nisi Prius, in Trespass.] In trespass quare clausum fregit, and plea of not guilty, a judge at nisi prius may amend the description of the locus in quo in the declaration, but a description of a house being on the "corner" of a lot, is not supported by shewing that it is near the corner, but that there are two or three other houses between it and the corner.

—Stanton et al. v. Windeat, 30.

At Nisi Prius. Ejectment. Joint to several Demise.] Where tenants in

common bring their action upon a joint demise, and an application is made at the trial for a nonsuit, they will not be allowed to amend by adding counts on separate demises.—Doe dem. Anderson et al. v. Errington, 159.

At Nisi Prius. Ejectment. Name of Lessor of Plaintiff.] Quære: Whether a judge at nisi prius can properly allow an amendment to be made in the name of the lessor of the plaintiff.—Doe dem. Ausman v. Munroe, 160.

Jurata in Nisi Prius Record.]—Amendment of jurata ordered in banc where a new trial had been ordered and the plaintiff had neglected to alter the jurata, in consequence of which the judge at nisi prius had declined to try the cause.—Doe dem. Crooks v. Cummings 256.

In Banc, after Order at Nisi Prius.] Where at nisi prius leave is granted to a plaintiff in ejectment to amend the record by altering the name of the lessor of the plaintiff, and neither the amendment nor any order for it on the record or postea is made at the time, the defendant will not be allowed subsequently on affidavit to make it.—Doe dem. Jacob Ausman v. Timothy Munro, 277.

Demurrer after Assessment of Damages.] Where damages have been assessed in a cause subject to a demurrer, and the demurrer is decided against the party assessing damages, the court does not hold itself precluded from allowing an amendment in the pleadings demurred to.—Maxwell v. Ransom, 281.

At Nisi Prius. Ejectment. Consent Rule.] A judge at nisi prius has no power to amend a consent rule in ejectment.—Doe dem. McQueen v. Voosburgh, 349.

At Nisi Prius. Replevin.] A judge at nisi prius has the power of making an amendment in the terms of a

demise in an avowry in replevin.—
Leader v. Smith, 366.

Term's Notice.] After four terms have elapsed since the last proceeding, an amendment cannot be made in a declaration, without a term's notice.—Doe Leck v. Ausman, 399.

At Nisi Prius. In Ejectment.] When the demise laid in ejectment was anterior to the time when the lessor's title accrued: Held, that an amendment in the record to correspond with the correct time was properly allowed at nisi prius.—Doe dem. Sinclair v. Arnold, 427.

At Nisi Prius, by adding Joinder in Demurrer.] Where in trespass quare clausum fregit, the defendant had pleaded a special plea, to which the plaintiff had demurred, but in making up the nisi prius record had omitted to enter the joinder in demurrer, the court held that an amendment by allowing it to be added was properly made at the trial.—Boulton v. Fitzgerald et al. 476.

Ejectment. Notice to Appear.] Where the notice to appear, in a declaration of ejectment, was addressed to the tenant by the Christian name of *James* instead of *William*, an amendment in the notice was allowed.—Doe Crumbback v. Roe, 518.

Penal Action.] Where after verdict for the plaintiff, and new trial granted for variance between the statement of the loan and forbearance as laid, and that proved, in a qui tam action for usury, the plaintiff moved to amend his declaration, by making it correspond with the evidence at the trial, the court discharged the rule.—Fraser qui tam v. Thomson, 522.

After Judgment, on Demurrer.] The court, under special circumstances, allowed an amendment of a defendant's pleadings, after argument and judgment on demurrer against

the rejoinder.—Hamilton, Administratrix v. Davis et al. 526.

In trespass quare clausum fregit, where judgment was given against the plaintiff on demurrer for defects in his replication, and the plaintiff desired to amend by adding a count for assault, the amendment was refused.—Henderson v. Harper, 528.

ARBITRATION.

Time for moving against an Award after Verdict.] Where a verdict is taken subject to a reference to arbitration, the court will not, unless under very peculiar circumstances, allow the award to be moved against, after the first four days of the term after it has been made.—Campbell et al. v. Cameron, 20.

Pleading, Mistake in Name of Arbitrator.] The effect of a repugnancy in a replication setting out an award to the submission set out on oyer, as regards the name of the arbitrator.—Tewsley v. Dunlop and Dunlop, 138.

Attachment for Breach of Condition of Reference.] The court will order an attachment to issue against a party who files a bill in equity, contrary to his undertaking in a rule of reference, and in disregard of a rule of court made thereon.—Manners v. Clarke, 191.

Matter not submitted Subject of Future Action.] Where plaintiff and defendant submit to arbitration all causes of action, &c., and an award is given, and plaintiff afterwards sues defendant for a cause of action not brought before the arbitrators, upon the ground that at the time of the submission plaintiff had no knowledge of its having accrued, an issue tendered as to the fact of such knowledge is material.—Lusty v. Van Volkenburgh, 214.

Plea of no Award, Rejoinder, Departure.] The plaintiff declares in debt on bond for the performance of

an award. Defendant pleads *no award* upon the premises. Plaintiff replies, setting out an award. Defendant rejoins matter extrinsic of the award, and relies upon it for shewing the award void. The rejoinder is bad, as being a departure from the plea.—*Maxwell v. Ransom*, 219.

Certainty of Award.] Under the award and declaration (as given in the statement of this case) the court held that the amount of £500, awarded to be paid by quarterly instalments was stated with sufficient certainty. Also, that the thirty days' default in the payment of the instalment of £125, falling due on the 10th of August, by which the plaintiff became entitled to claim the sum of £375, was sufficiently shewn in plaintiff's declaration; also, that the appointment of the third arbitrator, and the extension of the time for making the award under the hands of the arbitrators, without their seals, were valid acts according to the submission.—*Watson v. Sutherland et al.* 229.

Form of Rule to Set Aside an Award.] The court discharged a rule for setting aside an award, first, because it was not stated that the rule was drawn up on "reading the award"; and, secondly, because the alleged defects in the award were not sufficiently pointed out.—*Grand River Navigation Company v. McDougall et al.* 255.

Attachment for not Abiding by the Terms in a Rule of Reference.] Where a verdict was taken in a cause at Nisi Prius, subject to a reference, and the rule of reference was afterwards made a rule of court, and contained the usual clause against filing any bill in equity, and the defendant against whom the award was made, did not make any motion in this court in proper time, but filed his bill in equity, for which the court granted

attachments against him and his solicitor, upon which writs of habeas corpus were subsequently issued, the court refused to entertain a motion to set aside those writs, or suspend proceedings upon them.—*The Queen v. Maddock and Clarke: In re Manners v. Clarke*, 322.

Terms of Award.] Where, by the terms of an award made between the plaintiff and defendant, in consequence of differences which had arisen about the defendant going on the plaintiff's land to embank a stream, on which the defendant had a mill, the defendant was directed to pay to the plaintiff £10 a-year as long as he should hold, occupy, use and enjoy for his own use and benefit the premises on which he had such occasion to go, or any part thereof: It was held, that the payment was to be made every year, as long as the defendant's interest in the premises continued, although he might not have occasion to go on the plaintiff's land.—*Pickle v. Perrin*, 387.

Second Award.] After an award had been made, the arbitrators, discovering that they had made a mistake in the amount awarded, destroyed their award, and executed another: The court set the second award aside.—*Benson v. Love*, 398.

Costs of Delay.] Where, owing to the misconduct of a party to a reference, arbitrators do not make their award, but an award is made by an umpire, costs will not be granted to the other party on a summary application, under the clause in the rule of reference, "that if either party shall by affected delay or otherwise wilfully prevent the arbitrators or umpire from making their award, he shall pay such costs to the other as the court shall think reasonable and just."—*Proudfoot v. Trotter et al.* 398.

Misconduct of Arbitrators.] Where on a reference to arbitration, after the arbitrators had commenced their investigation, both the plaintiff and his attorney requested delay, and understood that it had been granted, but the arbitrators made their award in favour of the defendant, without giving further time, and without hearing all the testimony that the plaintiff might have offered: The award was set aside, without costs.—*Grisdale v. Boulton*, 407.

Where an award is set aside for irregular proceedings on the part of the arbitrator, such as the examination of witnesses in the absence of the parties, it will be set aside without costs.—*Campbell v. Boulton*, 407.

Pleading, Award.] Where to debt on an arbitration bond, the defendant pleaded performance, and the plaintiff replied setting out the award, which was for the payment by the defendant of a debt due to A. B. by the plaintiff and the defendant as co-partners, that the plaintiff was forced and obliged to pay the debt to A. B., but did not shew otherwise than by inference that it had not been paid by the defendant, the replication was held bad on special demurrer.—*Lymburner v. Norton*, 485.

ARREST.

A defendant cannot be arrested since the statute 7 Vic. ch. 31, on a writ issued before the act was passed, on an affidavit in the form required by the old law.—*Bruce v. Scholfield*, 1.

Commitment under 7 Vic. ch. 31, s. 6.] Under the statute 7 Vic. ch. 31, sec. 6, the court will not punish a defendant by commitment, unless, upon his examination, the cause of action and the circumstances connected with it would clearly warrant the court in taking such a course. No improper conduct being proved against the defendant when brought

up for examination under that section of the act, the court declined to commit him, leaving the plaintiff to recover satisfaction upon his judgment against the lands and goods of the defendant.—*McCue v. Todd*, 278.

Jurat of Affidavit.] It is not sufficient to state in the jurat of an affidavit to arrest since the passing of 7 Vic. ch. 31, that the affidavit was read over and explained to the deponent by the commissioner antecedent to the swearing thereof, without stating that it was *duly* read over, &c.—*Thayer v. Hensley*, 335.

Setting aside after Removal from inferior Court.]—Where, after arrest on bailable process issued from a District Court, the proceedings were removed into the Court of Queen's Bench, by writ of habeas corpus, and a motion there made to set aside the writ and arrest for a manifest defect in the affidavit of debt, the rule was made absolute, though it was shewn in the return of the writ, that a similar motion was pending in the court below, on which no judgment had been given.—*English v. Everitt*, 336.

Affidavit of Debt.] An affidavit of debt that the defendant was indebted in a named sum on a promissory note, *due at a day before the commencement of this suit*, the affidavit having been made several days before the writ issued, was held insufficient, as being equivocal and uncertain, on a reference to the court in banc.—*Clarke v. Clarke*, 395.

Affidavit of Debt.] An affidavit of debt for 80*l.* on a promissory note for that amount, and also for goods sold, not specifying the sum due on each account, nor whether the goods sold formed the consideration of the note; held insufficient.—*Mackenzie v. Reid*, 396.

Notice of Claim.] If a plaintiff omit to endorse his claim for debt and

costs on a bailable writ, the arrest under the writ will be set aside, although the omission is supplied immediately after the arrest is made.

—Gibbs v. Kimble, 408.

ASSUMPSIT.

Credit not expired.] Where work has been agreed to be done upon a certain credit, and the party, by failing to perform it within the time set, has disabled himself from suing upon the special contract, he cannot therefore recover on the common counts, before the expiration of the credit under the agreement. McMahon v. Coffee, 110.

Agreement to take Shares in a Steamboat, how to be sued on.] Where a party has subscribed for a certain number of shares in a steamer which another person intends to build, if he refuses to accept and pay for the shares, an action can only be maintained on the special agreement, not for the price of the shares in the boat not yet built, as if they were a vendible commodity. Cameron v. Thornhill, 132.

Transfer of Debts.] A. being indebted to B., and C. being indebted to A., B. and C., without the assent or knowledge of A., agree that C. shall pay B. the debt due to him by A., on condition that B. shall discharge A. from the debt owing by A. to B.: Held, that such agreement is binding on C., and that B. may maintain special assumpsit against him for its non-performance.—Tyrill v. Annis, 299.

Agreement under Seal.] Where an agreement was entered into, under seal, between A., B. and C., for the advance of certain monies by A. to B. and C., who were partners in a mill business, and who, from the assets arising from that business, were to repay such advances, and D. afterwards became a partner with B. and C.: Held, that A. could not maintain

an action of assumpsit against B., C. and D. jointly, for the recovery of the balance of such advances.—Mittleberger et al. v. Merritt et al. 330.

Transfer of Debts.] A. being indebted to B., and C. to A., a promise by C. that he will pay B. the debt due to him by A., in consideration that B. will discharge A. from the debt owing by A. to B., and an averment that B. did so discharge A., does not shew a promise to pay the debt of another, requiring a note in writing within the Statute of Frauds.

—Kissock v. Woodward, 344.

ATTACHMENT.

Discharge from.] A party applying for his discharge from custody on an attachment under 7 Vic. ch. 31, sec. 8, must shew that he is in contempt for non-payment of money, and the notice of his intention to move for his discharge must be served on the opposite party, and not on his attorney.—Garrison v. Balkwell et al. 2.

Several Lessors in Ejectment. Demand.] An attachment for non-payment of costs, under the consent rule, in an ejectment on the demise of several lessors, was granted against one of them, without any proof of demand or service upon the others.—Doe Cubitt et al. v. McLeod, 394.

Personal Service of Rule.] A rule nisi for an attachment must be personally served, and the original shewn at the time of service.—Crysler v. Campbell, 416.

ATTORNEY.

Summary Application against.]—Where an attorney purchases securities from his own client, using no undue advantage in the transaction, the court, though they may disapprove of the act, cannot punish him as for any violation of his duty.—In re complaint of Bartlett v. Meyers, an Attorney, 252.

Summary Application against.] The

court will not proceed summarily against an attorney upon a complaint of matters for which (if the charge were true) he might be indicted; especially where the affidavits in support of the charge are contradicted by affidavit.—*In re Patterson v. Miller, an Attorney*, 256.

Action on Bill. Fees to Counsel.] Counsel can sustain actions for such fees to be paid to themselves by their clients, as are established according to the table of fees under the 45th section of the Statute 2 Geo. IV. ch. 2; but where the fees claimed are not such as come within this provision of the act, the general principle of law in force in England applies equally to this province, and counsel have no right of action for fees generally.—*Baldwin et al. v. Montgomery*, 283.

Negligence. Damages.] In an action of special assumpsit against an attorney, for negligence in discharging the plaintiff's debtor who was in custody on a *capias ad satisfaciendum*, without any authority from the plaintiff for so doing, it is no misdirection to tell the jury that the damages are discretionary, and that it is not incumbent on them to give the plaintiffs a verdict for the whole amount of their debt.—*Bradbury et al. v. Jarvis*, one &c., 301.

Time for pleading Irregularity waived by Delay.] A demand of plea in an action against an attorney must still be served in term, or within four days afterwards, notwithstanding the tenth rule of the new rules of court, and he cannot be compelled to plead in vacation to a bill and demand of plea served in the same vacation; but where a bill and demand of plea were served on an attorney in vacation, and interlocutory judgment was signed, and notice of assessment given to him on 21st September, for the assizes to be held on 10th Octo-

ber, and he did not move in chambers against the proceedings, but gave notice of his intention to move in court on the following term on the 11th October, and moved accordingly; it was held that his application was too late, and his rule was discharged.—*Haigh et al. v. Boulton*, one, &c., 340.

Interlocutory Judgment, laches.] When, in an action against an attorney, a bill was filed and a copy and demand of plea served in vacation, and several months after the plaintiffs signed interlocutory judgment, and gave notice of assessment, and assessed damages: Held, that although the demand in vacation was irregular, the defendant, by his laches, had waived the irregularity.—*Cormack et al v. Radenhurst*, one, &c. 391.

Summary Application against.] The court will not grant an attachment against an attorney for not paying over money received by him as an agent, and not in his professional character, but if from the circumstances it appears that the attorney is not trustworthy, the court would probably interfere on a motion to strike him off the rolls. — *In re Hamilton O'Reilly*, one, &c. 392.

Appearing without Authority.] — Where an attorney entered an appearance, and defended an action brought against two defendants, who had never been served with process, nor given him any authority to appear or defend for them, nor had any notice of the proceedings, until after a verdict had been rendered against them: the court set the proceedings aside, and ordered that the attorney should pay all costs.—*Weir v. Hervey, Leavitt and Hervey jr.*, 430.

Payment of Costs by.] Where a declaration in ejectment had been served on a wrong party, and the attorney of the lessor of the plaintiff wrote to the attorney of the person

who ought to have been served, that if he would waive the irregularity and go to trial, no action for mesne profits should be brought against his client, if the lessor of the plaintiff should be successful, and the defendant's attorney accordingly went to trial and the lessor of the plaintiff obtained a verdict and judgment: the court stayed proceedings in an action which was afterwards brought by the attorney to recover the mesne profits from the defendant, and ordered that the attorney should pay the costs.—Stephenson v. McCoombs, 456.

BANKRUPTCY.

Under the Bankrupt Act 7 Vic. ch. 10, sec. 74, a person having obtained his certificate of discharge in bankruptcy, under the ordinance passed in Lower Canada, is discharged from his debts in Upper Canada, which were proveable under the Lower Canada commission.—McDonald et al. v. Dickenson, 15.

Giving a confession of judgment payable immediately, for a sum which is justly due to a creditor, who has pressed for payment, there being other creditors, is not a voluntary and fraudulent procuring of the debtor's goods to be taken in execution in contemplation of bankruptcy, within the meaning of the Bankrupt Act 7 Vic. ch. 10.—Beekman, Assignee v. Workman et al., 531.

The seizure and levy in execution under the Bankrupt Act 7 Vic. ch. 10, sec. 37, to avoid the effect of a commission of bankruptcy subsequently issued, mean only the seizure of the goods, and not the actual levying of the money thereout.—Hales v. Tracey, 541.

BARRISTER.

Counsel can sustain actions for such fees to be paid to themselves by their clients, as are established according to the table of fees under the

45th section of the statute 2 Geo. IV. ch. 2; but where the fees claimed are not such as come within the provisions of the act, the general principle of law in force in England applies equally to this province, and counsel have no right of action for fees generally.—Baldwin et al. v. Montgomery, 283.

BILLS OF EXCHANGE.

Notice of Dishonour.] A letter giving notice of the dishonour of a bill, though from misdirection it has not reached its destination so soon as it would otherwise have done, is nevertheless a sufficient notice, if, being posted sooner than was necessary, it has in fact been received within the period allowed by law for giving notices of dishonour. Where no evidence has been given of a notice of dishonour, and there has been a subsequent unconditional promise to pay, with the knowledge of a default on the part of the holder, the evidence of notice is dispensed with. A promise to pay, after dishonour, and knowledge of laches on the part of the holder, is evidence, as well since as before the new rules, to support the averment in the declaration, that due notice of the dishonour had been given.—Bank British North America v. Ross, 199.

Lost Bill. Promise to pay.] Where plaintiffs declared in special assumpsit, on a promise to pay a lost bill of exchange, against the drawer, but did not state any new consideration for the promise, nor allege that the bill, which was drawn payable to the plaintiff's order, was unendorsed at the time of its loss: the declaration was held bad, on general demurrer.—Russel et al. v. McDonald et al., Executors of McDonell, 296.

BOARD OF WORKS.

The court, although affidavit was produced that there was no member

of the Board of Works residing in Upper Canada on whom a copy of process could be served, refused to allow service to be made on an engineer employed by the Board in Upper Canada, or by affixing a copy of the process in the Crown office.—

Sherwood et al. v. The Board of Works, 517.

BOND.

Collection of Township Rates.] A bond given to the treasurer of a district by a collector of township rates, after the passing of the statute 6 Will. IV. ch. 2, and before the repeal of the statute 5 Will. IV. ch. 8, may be sued upon and a good breach assigned, in not paying over monies collected for arrears of rates due five years preceding that for which such collector was chosen to act, though the condition that he would collect such rates would not be binding after it had been made his duty by law to collect only those of the current year.—*McLean, Treasurer, &c. v. Shaver et al.*, 189.

Performance of Condition.] Where a party, whose goods are seized under a fieri facias, gives bond to deliver them up to the sheriff on request: Held, that the effect of that condition is merely that they shall be forthcoming when demanded, and that the sheriff cannot insist on the parties removing them to any particular place within the district; and where, in such a case, the obligor had once delivered up the goods to the sheriff, the condition is performed; and, if they are left in his hands, his refusing to give them up on a subsequent occasion, cannot be set up as a breach of the condition.—*Malloch, Sheriff of Dalhousie v. Patterson*, 261.

BOUNDARY LINE COMMIS- SIONERS.

An award made under the Boundary Line Commissioners' Act, 1 Vic.

ch. 19, on a subject within the jurisdiction of the commissioners, and in which both parties interested were heard, and which had not been appealed against, held to be conclusive between those parties.—*Havens v. Donaldson*, 371.

CAPIAS AD SATISFACIEN- DUM.

The statute 7 Vic. ch. 31, abolishing imprisonment in execution for debt, deprives a plaintiff of the power of arrest in execution, as well in cases carried to judgment before, as since the passing of the act.—*Bank of British North America v. Clarke*, 1.

A defendant who has been charged in execution since the passing of the act 7 Vic. ch. 31, on a judgment obtained before the act, is entitled to be discharged from custody.—*Bell v. Ley*, 9.

Where a defendant was arrested on mesne process and committed to prison, and afterwards charged in execution in the cause, without a new affidavit, before 7 Vic. ch. 31, the court held he was not entitled to his discharge, as the plaintiff could issue a writ of capias ad satisficiendum against him without a new affidavit, as well where he had been committed to prison on mesne process, as where he had been held to special bail.—*Hamilton v. Mingay*, 22.

CARRIER.

Forwarding Goods.] A warehouseman receiving goods to forward, discharges his undertaking and consequent liability by delivering them properly directed to the master of a steamer or other vessel, on board of his vessel, engaged in the carrying trade between the place at which the goods were received and the place to which they are to be forwarded; and averring in the declaration that he received the goods *to be forwarded*

by him, does not charge him as a common carrier.—Beckett v. Urquhart, 188.

Carriers or Warehousemen.] Where flour was delivered to the defendants, who were warehousemen and common carriers, with directions to sell such portion of it as they could during the winter, and put the remainder in transitu for the plaintiff in the spring, and some sales having been made, before the navigation opened in the spring an accidental fire destroyed the remainder of the flour, without any default or negligence of the defendants : Held, that as the flour at the time of the fire, was in the hands of the defendants as warehousemen, and not as common carriers, they were not responsible for its loss.—Thirkell v. McPherson et al., 318.

CASE.

Malfeasance or Nonfeasance, Effect of not guilty in.] Where the plaintiff declared in case for an injury done to his horses by falling into a hole made in a public highway, by the water overflowing a mill dam of the defendants', and tearing up the road, by which it was alleged that it was the duty of the defendants to fill up the hole, or fence it round so as to prevent accidents, and the defendants pleaded that the plaintiff was driving the horses at the time, and that it was through his own carelessness and negligence and of his own wrong that they fell into the hole, the plea was held bad on special demurrer, as amounting to the general issue, but the declaration was also held to be insufficient, as it ought to have been framed for the malfeasance in erecting or continuing the dam, &c., and not for the nonfeasance which was complained of, in not filling up or fencing round the hole.—Nellis v. Wilkes et al. 46.

Fraudulent Collusion.] An action on the case will lie against a party

who has collusively obtained from his debtor a confession of judgment for a larger sum than is really due to him, under which the debtor's property has been sold in execution, at the suit of another creditor of the debtor, who has been injured by these collusive proceedings between the first creditor and the debtor.—Ley v. Madill, 546.

Seduction of Illegitimate Child.] The father of an illegitimate daughter cannot under our statute 7 Will. IV. ch. 8, bring an action for her seduction, merely on the footing of being her father.—Biggs v. Burnham, 106.

Seduction under 7 Will. IV. ch. 8.] The statute 7 Will. IV. ch. 8, restrains the master of an unmarried female from suing for her seduction until six months have elapsed from the birth of the child, and it be first seen whether the father or mother of the female, within that time, (not having abandoned her before her seduction) intend bringing their action.—Whitfield v. Todd, 223.

Pleading Loan or Hire.] Where the plaintiff declared in case, charging the defendant with taking his mare on *loan*, and averring a breach of duty in not using her in a proper and careful manner, whereby she was injured and died, and the defendant pleaded that he obtained the mare from the plaintiff on a contract for *hire*, and not on loan, the plea was held a good answer.—Robertson v. Brown, 345.

Seduction. Action by mother of Illegitimate Daughter.] The mother of an illegitimate daughter may maintain an action for her seduction.—Muckleroy v. Burnham, 351.

Nuisance. Reversionary Interest. Damages.] In an action on the case by reversioners for a serious injury to their reversionary interest, by the erection of a nuisance in a public

highway, the jury are not necessarily restricted to a verdict for nominal damages on the first trial, but may give damages commensurate with the injury which the plaintiffs may sustain by the possible continuance of the nuisance.—*Drew et al. v. Baby*, 438.

COGNOVIT ACTIONEM.

Proof of Execution.] Where a cognovit was given by one practising attorney and witnessed by another, who was absent from the province, leave was given to enter judgment, upon proof of the handwriting of the defendant and the witness.—*Cleal v. Latham*, one, &c., 412.

CORPORATION.

Contract not under Seal.] Semble, that a municipal corporation may contract to hire a clerk or servant, to render services in the ordinary business of the corporation, without using their corporate seal; and such servant may sue on the contract.—*Raines v. The Credit Harbor Company*, 174.

Ordnance Officers.] The statute 7 Vic. ch. 11, sec. 30, enables the principal officers of her Majesty's Ordnance to sue, in their corporate capacity, for the price of Ordnance stores sold by them *before* the passing of the act.—*Principal Officers of her Majesty's Ordnance v. Johnson*, 198.

Board of Works.] The Court, although affidavit was produced that there was no member of the Board of Works residing in Upper Canada, on whom a copy of process could be served, refused to allow service to be made on an engineer employed by the Board in Upper Canada, or by affixing a copy of the process in the Crown office.—*Sherwood et al. v. The Board of Works*, 517.

COSTS.

Under 49 Geo. III.] Where the defendant moved to deprive the plaintiff of costs for a vexatious arrest, under 49 Geo. III. ch. 4, the difference between the amount recovered and that sworn to being only £7, and in his affidavits a wrong Christian name was given to one of the plaintiffs in the style of the cause, the court refused to allow them to be amended, and discharged the rule.—*Rose et al. v. Cook*, 5.

Full Costs. When Certificate to be moved for.] Motion for a certificate for Queen's Bench costs, under provincial statute 58 Geo. III. ch. 4, if not made until after several other causes have been tried, though upon the same day, will not be granted.—*McKee v. Irvine*, 160.

Security for.] A military officer, on duty out of Canada, and suing as plaintiff, must, upon the usual affidavit, give security for costs.—*Tripp v. Fraser*, 253.

Under 5 Will. IV. ch. 1, on Note under £100.] If there be two indorsers on a promissory note under £100, and the holder of the note brings separate actions against them, he will, under 5 Will. IV. ch. 1, be entitled to tax his full costs in only one suit, and will be allowed no more than disbursements in the other.—*Shuter v. Dee*, 292.

Action on Judgment.] The court refused to allow the plaintiff his costs in an action brought by him on a judgment, where it appeared that after execution he had commenced the suit by proceeding by attachment under the Absconding Debtors' Act.—*Keeler v. Brouse*, 348.

Under 7 Will. IV. ch. 3, secs. 24 and 26.] Where in an action of trespass against two, they pleaded the general issue, and separate justifications, to which the plaintiff demurred

and went to trial, and obtained a verdict on the general issue, assessing contingent damages on the demurrs on which judgment was afterwards given for one of the defendants, and against the other: Held, that under 7 Will. IV. ch. 3, sections 24 and 26, the defendant who succeeded on demurrer, was entitled to enter judgment for his costs.—Clarke v. Durham et al., 395.

Full Costs. Revision of Taxation.] If a plaintiff on verdict is entitled to tax only District Court costs, and the defendant neglects to take out a rule to be present at taxation, the court will not, after the plaintiff has taxed District Court costs, on the motion of the defendant, direct a revision that the defendant's costs of defence may be deducted under the statute.—McCall et al. v. Cameron, 414.

Full Costs on Note under £40.] Full costs were allowed in a joint action against the maker and indorser of a note, under 5 Will. IV. ch. 1, where the defendants resided and were served with process in different districts.—The Bank of British North America v. Denison et al., 414.

Under 49 Geo. III. ch. 4.] Where the defendant applied for costs, under 49 Geo. III. ch. 4, the rule was refused, because it nowhere appeared in the affidavits for what amount the plaintiff had recovered a verdict.—Powell v. Gott, 415.

Under 49 Geo. III. ch. 4.] Where a cause is referred to arbitration, by order of nisi prius, but no verdict taken, the defendant cannot move to deprive the plaintiff of costs under 49 Geo. III. ch. 4.—Powell v. Gott, 418.

Action on Judgment.] The court refused to allow a plaintiff costs in an action on a judgment, although the defendant had pleaded a false plea of

nul tiel record.—McDonald v. Clarke, 527.

CUSTOMS.

Where a claim for goods seized for an alleged infraction of the revenue laws, was brought before the commissioners of customs, under provincial statute 4 Geo. IV. ch. 11, and the commissioners upheld the claim and restored the property to the claimant, *without any trial or verdict* passing upon the matter, but gave a certificate to the officer of customs who had seized, that there was a probable cause of seizure, such certificate, however, not being entered of record in any way: Held, in an action of trespass against the officer for the seizure, that the certificate afforded him no protection, either under the Provincial Stat. 4 Geo. IV. ch. 11, sec. 27, or the Imperial Stat. 3 and 4 Will. IV. ch. 59, sec. 72.—Lewis v. Kirby, 486.

DE INJURIA.

Promissory Note. Indorsee versus Maker.] In an action by the indorsee of a promissory note against the maker, *de injuriâ* is a good replication to a plea of usury, between the indorser and indorsee; but where the defendant pleaded as to part of the sum secured by the promissory note, that the maker made the note only for the accommodation of the payee, and that the indorsee gave only a certain sum for it, and that it was transferred to him to secure that sum, and the plaintiff replied that the note was given to him to secure that sum to be paid at a particular time, but that if it were not paid at that time the plaintiff was to hold the whole sum secured by the note: It was held that the replication was bad in substance, as the defendant, being only an accommodation maker, could not be charged with more than the plaintiff gave for the note.—Strathy v. Nicholls, 32.

Plea of Discharge.] One of the joint makers of a promissory note can not plead that he made the note, with the plaintiff's knowledge, only as a surety for the other maker, and that the plaintiff gave time to the other maker without his knowledge or consent, and that he was thereby discharged; and if such a plea were tenable, *de injuriâ* would be a good replication to it.—*Davidson v. Bartlett and Murney*, 50.

DEVISE.

Where a testator devised as follows, "as touching my worldly estate, I give, devise and dispose of the same in the following manner:—I will that my just debts be paid, should any remain unpaid at my decease. I hereby give and bequeath unto my executors, hereinafter named, my real property, for the express purpose of satisfying the same; after which, I will that the residue of my lands, messuages, hereditaments, and premises, with my personal estate, or the proceeds thereof, (if sold by my executors, which I hereby authorize them to do, for the benefit of my children), be divided in equal shares among my six beloved children, viz: Eliza Ann, James Francis, Charles Thomas, Henry Raymond, John Edward, and William Lewis;" and then appointed certain persons to be his executors: Held, that the children took an estate in fee, and not for life, in the real estate.—*Baby v. Baby*, 54.

Personalty. Life Estate.] A devise of the use, possession and occupancy of a dwelling-house and premises with land attached, together with furniture, plate, linen, china, library and other effects therein at the time of the death of the testator, to occupy, possess and enjoy the said house, land, furniture and premises, during the natural life of the devisee, does not give such an interest in the

personal property so devised, as to enable the devisee to dispose of them absolutely by will; and the executor of the testator, giving notice to the executors of the devisee, may, at a sale of such property (by the executors of the devisee), purchase, and subsequently, on action brought, resist the payment.—*Dickson et al., Executors of Clarke v. Street*, 180.

DISTRESS.

Case for excessive Distress.] Where in an action on the case for excessive distress, a count charges the *landlord* with selling the goods for extortionate and illegal charges, such count, being contrary to the provisions of the 1 Vic. ch. 16, sec. 4, cannot be sustained.—*Nicholls v. Mooney et al.* 199.

DISTRICT COUNCIL.

Debt against for Cause of Action before District erected.] An action of debt is maintainable against a municipal council upon a contract entered into with the building committee for building the gaol and court house of the district, before the district was set apart, and it is sufficient in the declaration to describe the building committee as such, without naming the persons of whom it was composed.—*Keating v. The Council of the District of Simcoe*, 28.

Fees of Clerk of the Peace.] A clerk of the peace cannot charge fees for any service for the remuneration of which no provision is made by statute or otherwise, and the payment of such fees by a district council in accounts rendered for services in former years, will not prevent their afterwards disputing the charges in the accounts of subsequent years. If a clerk of the peace accept a salary in lieu of all fees, he is not afterwards entitled to any remuneration except such salary, and an action will not lie

against the district council for fees charged for services performed by a clerk of the peace.—*Askin v. the London District Council*, 292.

Bond for Rates to Treasurer.] The Municipal Council Act, 4 and 5 Vic. ch. 10, invests in the municipal council of each district the power of suing on a bond given to the treasurer of the district, for the due payment over to him of the rates received by the collector, and it is sufficient to aver in the declaration that the monies collected are due and payable to the treasurer.—*Eastern District Council v. Hutchins*, 321.

Form of Action against.] Where the plaintiff brought an action of debt on the common counts against the Huron District Council, for compensation awarded to him by a jury, for making a road across his premises, before the formation of the Huron District, and while the land formed part of the District of London, and the Huron District had, after its erection, assumed the payment of the sum awarded, the court held that the action would not lie against the Huron District Council at all, but that even if the council had been responsible, the declaration should have been special.—*McKee v. The Huron District Council*, 368.

Bond of Collector of Rates to District Treasurer.] The Municipal Council Act, 4 & 5 Vic. ch. 10, does not vest in the municipal councils of the several districts, the right of suing upon bonds given by collectors of assessments, to the treasurers of districts, after that act was passed; but, on such bonds, the treasurer of a district can sue in his own name.—*O'Connor v. Clements et al.*, 386.

DIVISION COURT.

School Assessment.] A township collector may sue for the amount of

an assessment for common schools, under 4 & 5 Vic. ch. 18, in a division court.—*McGregor v. White*, 15.

Notice of Action, Plea of.—The want of notice of action in a suit against a bailiff of a division court, acting in his office under 4 & 5 Vic., ch. 3, must be pleaded, and cannot be given in evidence under the general issue. But where under that act a bailiff seizing and selling goods, under an execution, is entitled to notice, the plaintiff in the execution is not, as he is not within the protection of the 6th clause, as a “person acting in the execution of the act.”—*Timon v. Stubbs and Balfour*, 347.

DOWER.

Damages.] The Court refused to entertain a motion to increase the damages in dower, where no point had been reserved, and where the motion was not made until the second term after the assizes at which the cause was tried.—*Watson v. Terwelleger*, 21.

Service of Summons in.] The writ of summons in dower must be served fourteen days before the return day.—*Fullmer et Ux. v. Dougan*, 402.

Style of Parties in Suit.] It is irregular, in an action of dower, to style the parties in the cause *defendant* and *respondent*, and affidavits so entitled cannot be read.—*Ferguson v. Malone*, 519.

EJECTMENT.

Adverse Possession.] Where A. and B. were proprietors of adjoining lots, and B. had encroached for more than twenty years upon a part of A.'s land which was cleared, and B.'s fence which enclosed the encroached land, would, if protracted, have included also a portion of A.'s woodland, which had never been fenced, it was held, that B's adverse possession of the fenced land could not be extended

to the woodland, which his fence, if protracted, would have enclosed.—Doe dem. Hill v. Gander, 3.

Tenant at Will. Demand of Possession.] Where a person enters into the possession of land, under an agreement to purchase, he is a tenant at will to the seller, and at the seller's death his heir at law can maintain ejectment against him, without any notice to quit, or demand of possession.—Doe Kemp. v. Garner, 39.

Forfeiture, Breach of Conditions.] Where a father had conveyed a house and premises to his son in fee, and the son afterwards made a lease to his father and mother, for their joint lives, at a nominal rent, and on the same day the father and mother executed an agreement, under seal, to the son, that he should occupy the house, except certain rooms in it, and take the rents and profits of the land upon certain conditions, on breach of any of which he was to go out of possession, but the mother did not release her right under the statute: Semble, that the mother could not, after the father's death, on the ground that she had not barred her freehold interest under the life lease, maintain ejectment for the whole of the premises without shewing a forfeiture of the agreement by breach of the conditions, although she was entitled to recover the rooms which were excepted from the son's occupation under the agreement.—Doe Peck v. Peck, 42.

Adverse Possession against the Crown.] The grantee of the crown may maintain ejectment against a person who has been in adverse possession of the land granted for upwards of twenty years, and it is not necessary that the crown should proceed by information of intrusion in such a case before the grant, or that the grant should specially convey the

crown's right of entry in the land to the grantee.—Doe Fitzgerald et al. v. Finn, 70.

Demise by Guardian.] A guardian appointed by the Vice Chancellor, upon petition of an infant, cannot make a demise for the purpose of trying the title to the infant's land in ejectment. The demise should be by the infant.—Doe dem. Melian Marianne, Guardian of Isabella Odell Marianne, an Infant, v. Alexander, 120.

Transfer of Estate by Disseisee, while Disseisor in possession.] A person disseised of land by another, who is in possession, claiming the estate in opposition to him, cannot, while he is so dispossessed, transfer the estate by grant,—or by bargain and sale.—Doe dem. Dunn v. McLean, 150.

Attachment for non-payment of Costs.— Notwithstanding the late act abolishing imprisonment for debt, an attachment may still issue for non-payment of costs in ejectment under the consent rule.—Doe dem. Dummer v. Benton, 157.

Sheriff's Vendee.⁽¹⁾ Possession.]— Mere possession of land by a debtor constitutes *prima facie* a *seisin* in fee, and such an estate cannot be sold under an execution against goods and chattels, Doe dem. Keogh v. Calhoun, 157.

Inconsistent Defences.] Where at the trial a defendant in ejectment endeavours to make title in himself, as the owner of the fee, and fails, he is precluded from defending himself upon the ground of want of notice to quit, or demand of possession.—Doe dem. King's College v. Graham, 158.

Joint to several Demise.] Where tenants in common bring their action upon a joint demise, and an application is made at the trial for a nonsuit, they will not be allowed to amend by adding counts on separate demises.—

Doe dem. Anderson et al. v. Errington, 159.

Sale of Lands in execution several Years after return of Writ.] The sale of lands by a sheriff under a s. fa., five years after the sheriff who sold had left his office, where there had been no seizure or advertisement of sale during the currency of the writ, no continuance of proceeding under it, and no assent of the parties to the delay, cannot be upheld. *Quare.*—Would such a sale be valid even though the sheriff had continued in office up to the period of sale.—Doe dem. Young v. Smith, 195.

Stay of Proceedings.] Where in ejectment a defendant appears and enters into the usual consent rule, and obtains an order to stay proceedings until security for costs be given, and the plaintiff subsequently serves new declarations, such subsequent proceedings will be stayed until the costs in the former suit are paid, even though the plaintiff had not joined in the consent rule.—Doe dem. J. Anderson v. Thomas Anderson, 275.

Title of Cause.] In ejectment, all proceedings prior to the entering into the consent rule, must be entitled in the cause against the casual ejector. Doe ex dem. Sutton v. Ball, 279.

Declaration. Certainty of Description of Land.] Where the declaration in an action of ejectment designates the property sought to be recovered by the lot and concession of a township, without mentioning the quality or description of land, the declaration is sufficiently certain.—Doe dem. O'Reilly v. Pickle, 282.

Nonsuit, for not confessing Lease, Entry and Ouster, refusal to set aside.] Where a defendant in ejectment, relying upon some supposed irregularity in the plaintiff's proceedings, did not appear at the trial, and the plaintiff was nonsuited for want of confession of lease, entry and ouster by the

defendant, and the point of alleged irregularity was afterwards decided against the defendant, the court refused to set aside the nonsuit and let him in to a trial on payment of costs, although he swore to merits.—Doe Leonard v. Myers, 299.

Demand of Possession.] Where a defendant was in the possession of land, under an agreement to purchase, the purchase money being payable by instalments, and after the payment of the first instalment failed in the payment of any of the others, but remained in possession for many years, until the plaintiff offered to give him a deed on certain terms, which were not complied with, and told him that he might remain in possession for the summer if he would leave the land in the autumn, which the defendant refused: Held, that the jury having found that the plaintiff had at this time determined the holding at will, the defendant was not entitled to a demand of possession.—Doe dem. Stodders v. Trotter, 310.

Lot 24, Concession 1, Township of Kingston.] The eastern side line of lot 24, in the front or first concession of the township of Kingston, cannot be run as it is described in the grant from the crown, or parallel to the western limit of the township, according to 59 Geo. III. ch. 14, because that would carry the concession beyond the line which was originally run out as its eastern boundary.—Doe dem. Stuart v. Forsyth, 324.

Description of Premises in Consent Rule.] Where the plaintiff in ejectment declared for lot 11, in the 4th concession of Sydney, and the tenant defended for lot 12, in the same concession, stating it in his consent rule to be the same premises mentioned in the declaration, and the plaintiff, treating it as a nullity, signed judg-

ment against the casual ejector, the court held the consent rule good, and set aside the judgment for irregularity.—Doe dem. Gilkison v. Shorey, &c., 341.

Consent Rule.] A judge at nisi prius, has no power to amend a consent rule in ejectment.—Doe dem. McQueen v. Voosburgh, 349.

Voluntary Deed.] A deed made by one brother to another, in consideration of natural love and affection, is void against a subsequent purchaser from the grantor for valuable consideration.—Doe dem. Phillipott v. Blanchfield, 350.

Staying Proceedings.] In an action of ejectment by an heir, the court refused to stay proceedings, until the costs of a former action, brought for the same premises by the ancestor, had been paid; the ancestor having died before any legal determination of that suit.—Doe McKay v. Roe, 400.

Notice to appear.] Where in a country cause a tenant was called upon, in the notice from the casual ejector, to appear within the first four days of term, and he obtained a rule nisi to set aside the service of the declaration for irregularity, on that ground, the lessor of the plaintiff had leave to amend the notice on payment of costs.—Doe Kemp v. Roe, 406.

Demand of Possession. Proof of Title by Rector.] A demand of possession by a person whose authority is afterwards recognized by the person having title, is sufficient. In ejectment by a Rector, for glebe land, he must prove presentation, institution, and induction; and if any one of these be wanting, the action must fail.—Doe dem. Creen v. Friesman, 420.

EVIDENCE.

Public Document.] Any public document, filed in a public office of the

government, may be proved by an examined copy.—McLean v. McDonnell, 13.

Case. Long Possession to shew Leave and License.] Whether long possession of an easement in land, though it may not supply evidence of a grant, may be received in support of a plea of leave and license. New trials will not be granted upon the extreme right of the party merely, but only to advance the substantial ends of justice.—Brown v. Street, 124.

Payment. Reduction of Damages.] Where judgment is recovered in an action against two parties, jointly liable, and at the instance and for the benefit of one of the parties, who pays the debt without costs, the plaintiff proceeds to enforce payment of the whole amount from the other party, the court will order the damages assessed by a jury, on the breach assigned in an action on a limit bond given by that other party, to be reduced to the costs and charges in the original action.—Gooderham, Assignee of the Sheriff of the District of Gore, v. Chambers, Ritchie, and Beasley, 172.

Receipt in full.] A receipt in full is not conclusive evidence of payment, but is a mere admission, which is always susceptible of explanation, in respect to the circumstances under which it was given, and the purposes which it was intended to answer.—Montforton v. Bondit, 362.

Justification without Special Plea.] Where in an action against an attorney for false imprisonment, under a writ alleged to be void, the plaintiff produced the writ to connect the attorney with the arrest: Held, that the attorney could not justify under the writ so produced by the plaintiff, without a special plea.—O'Reilly v. Armstrong, 444.

Justification in Trespass.] Where in trespass quare clausum fregit, the defendant attempted to justify under a writ of possession, and put in a judgment against the casual ejector for lands in the same township generally, not describing them, and a scire facias to revive that judgment, on which the plaintiff had been summoned as terre tenant, and a judgment on the scire facias, each as general in the description of the lands as the judgment against the casual ejector, the plaintiff not having been in possession when judgment was entered against the casual ejector: the court held that the justification was not complete, without shewing that the plaintiff had been connected with the proceedings in ejectment.—*Reeves v. Myers*, 462.

EXECUTION.

Irregularity.] It is an irregularity only, and not a nullity, to issue an alias fi. fa., after a return of "goods on hand" to the original fi. fa. and a ven. ex. upon it, on which the sheriff returns "that the goods had been exhausted by prior writs;" and the irregularity is waived by the application against it not being made in due time.—*The Commercial Bank v. McDonell et al.*, 406.

EXECUTOR AND ADMINISTRATOR.

Probate of Will granted in England.] Probate of a will, granted by the Prerogative Court of Canterbury, in England, gives no title to an executor to sue for a cause of action accruing in this country, the testator having died here. The executor cannot maintain his action without producing letters testamentary, granted by proper authority in this province.—*White, Ex. v. Hunter*, 452.

FALSE IMPRISONMENT.

Justification under Hawkers' and Pedlars' Act.] In an action of trespass for false imprisonment, a plea justifying the arrest as a constable without a warrant, under the Hawkers' and Pedlars' Act, 58 Geo. III. ch. 5, for pedling without license, must shew that the plaintiff was *found trading* at the time of the arrest, and that the defendant took him before three of the nearest justices of the peace.—*Oviatt v. Bell*, 18.

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FRAUDS, STATUTE OF.

Interest in Lands.] An offer in writing to purchase lands, stating terms, and an acceptance of that offer, also in writing, is a sufficient contract in writing respecting an interest in lands under the Statute of Frauds.—*Kerby v. Lawrence*, 184.

Debt of Another. Money had and received.] Where a plaintiff had been employed by A. in getting out timber, which A. afterwards sold to the defendant, who agreed verbally with the plaintiff and others who had been working with him, the timber being in their possession, that he would pay the wages of the plaintiff and the others, if they would assist in rafting the timber to Quebec, out of the proceeds of its sale there: Held, that on shewing the sale there, the plaintiff was entitled to recover for his wages as money had and received; and that the case was not within the Statute of Frauds.—*McDonald v. Cook*, 542.

GRANT FROM THE CROWN.

Construction of.] A grant from the crown conveying land to within one chain of a river, means to within one chain of the edge of the river, and not of the top of the bank of the river.—*Stanton et al. v. Winstead*, 30.

GUARANTEE.

In a declaration against the drawer of a bill, notice of dishonour must be averred; and if to excuse such notice, want of effects be averred, it must

be shewn that there were no effects from the time of drawing the bill; and notice must also be averred where the defendant is only a guarantee for the bill; and a replication to a plea stating that a bill of exchange had been taken "in full satisfaction and at all hazards" by the plaintiff, that the bill was dishonoured when due, is bad on general demurrer, as the plea is an answer to the action.—*Goldie v. Maxwell*, 425.

HEIR.

Action by Heir not named.] Held, that an heir could not sue on a covenant entered into with the ancestor, to convey land to him, his heirs and assigns, within a certain time, the heir not being mentioned in the covenant, and the breach having taken place in the ancestor's lifetime.

—*Goodall v. Elmsley*, 457.

HIGHWAY.

The original public allowances for road made in the first survey of a township, continue to be public highways, notwithstanding a new road, deviating from any such allowance, may have been opened under the provisions of the statute 50 Geo. III. ch. 1, or may have been confirmed as a highway by reason of statute labour or public money having been applied upon it.—*Spalding v. Rogers, et al.*, 269.

HUSBAND AND WIFE.

Action by Wife in Husband's Name after he had abandoned her.] Where a wife, who had been abandoned by her husband for several years, took a lease of some premises without her husband's knowledge, on which the defendant afterwards trespassed, and she brought an action against him in her husband's name: Held, that the action was properly so brought.—*Jones v. Spence*, 367.

INDEMNITY.

A party giving a bond to hold harmless in any actions that may be brought, and to pay all costs and charges thereby accruing, is bound to indemnify as well against the legal result of any such actions as for the trouble and expense occasioned to the party to be indemnified by the bringing of any such action. In an action brought on a bond of indemnity, a defendant may plead that the payment made by the obligee was without necessity, and made in his own wrong. It is not necessary since the new rules, even in cases commenced previous to their coming into operation, that a replication should commence with *præcludi non*, or conclude with a prayer of judgment.—*Hamilton, Executrix, v. Davis and Ford*, 176.

INFORMATION.

The proceedings of an ex-officio information may be either at the suit of the Queen or the attorney general, but the defendant cannot be called upon to plead in vacation, upon a rule to plead given in vacation; but is entitled to a regular rule to plead, and an imparlance.—*The Queen v. Burnham*, 413.

INTERPLEADER.

Sheriff.] A sheriff who has seized under a *f. fa.*, goods and chattels, the property in which is disputed, will not be relieved under the statute 7 Vic. ch. 30, where the application for relief is not made until after the return day of the writ, unless the delay is satisfactorily explained.—*Cole v. McFaul*, 276.

Sheriff. Costs.] Where a sheriff obtains a rule under the statute 7 Vic. ch. 30, calling upon parties to sustain their claims to property seized under execution, and one party fails to appear, his claim as

against the sheriff is barred ; and the party appearing is entitled to have his costs paid by the party failing to appear.—Johnson v. Baldwin, 280.

JUDGMENT.

A judgment in an inferior court for a specific sum, is *prima facie* evidence in a superior court against a less sum only being due ; and, as respects the merits of the judgment it is conclusive evidence, till it is repelled by proof of such facts as have been admitted to destroy the effect of a foreign judgment as evidence of a debt.—Page v. Phelan, 254.

JURY PROCESS.

In ordinary cases in this court, there is no necessity for the plaintiff to issue writs of *venire facias*, and *habere corpora juratorum*.—Boulton v. Fitzgerald, et al., 476.

LANDLORD AND TENANT.

Yearly Tenancy.] A letting at an annual rent, constitutes a yearly tenancy, which continues at the same rent for the second year as the first, if the tenant remain in possession of the premises, and the landlord may distrain for the first year's rent, at the end of the second year, and the real property act, 4 Will. IV. ch. 1, sec. 20, does not determine the tenancy at the end of the first year, so as to make it necessary to distrain within six months afterwards.—McClenaghan v. Barker, 26.

Surrender.] Where in trespass for taking goods, the defendant having justified under a distress for rent, the plaintiff replied a new lease, by which the demise under which the distress had been made was surrendered and determined by operation of law, and the defendant rejoined specially, traversing the surrender, it was held that the special traverse was bad, as

it was of a matter of law.—Strathy v. Crooks, 44.

Right to distrain.] Memoranda or heads of agreement, ascertaining no certain amount of rent, being preparatory to a letting, and under which no rent has been paid before the distress, do not constitute a present demise entitling the landlord to distrain.—Cheney & Breck v. Taylor, 166.

Disclaimer. Notice to quit.] A tenant endeavouring to defend his possession by a title adverse to the lessor of the plaintiff, is not entitled to notice to quit ; a new trial will only be granted, to advance the substantial ends of justice, where the grounds are discretionary with the court.—Doe dem. Graham v. Edmondson, 265.

Disclaimer.] The effect of a disclaimer by a tenant of his landlord's title, is at once to put an end to an existing tenancy, and an ejectment may be maintained without a notice to quit, and without waiting until the period when the tenancy will expire.—Doe Claus v. Stewart, 512.

LANDS.

Acquiescence in Sale under Execution.] A party against whose lands a writ of *fi. fa.* was issued, under which the lands were seized and sold, cannot contest the validity of the sale on the ground of long delay in selling after the seizure, where it appears that the sale took place at his own instance, or with his assent, and that he has received the benefit of the proceeds of such sale. Neither can his heir, after his death, take an exception to the proceedings.—Doe dem. Harley v. McManus, 141.

LAND TAX.

What Lands liable to.] Lands "described as granted" by the surveyor general, are taxable under 59

Geo. III. ch. 7, although no letters patent for them have ever issued.—But in ejectment by a sheriff's vendee to recover lands sold for arrears of taxes, he must prove that there was no sufficient distress on the premises to satisfy such arrears, before he can recover. It is not necessary that he should shew that the writ, under which the lands were sold, was in the sheriff's hands for the period required by law.—*Doe McGillis v. McDonald*, 432.

LEASE.

Covenant. Assignee of Lessee.] A plea to an action of covenant against the assignee of a lease, for rent due under the lease, that all the estate of the lessee in the demised premises did not come to and vest in the defendant as the plaintiff alleges, is a good plea; but in such an action the defendant cannot plead that the lessee was seised in fee before the demise, and conveyed the premises to the defendant in fee, or that the lessee leased to a third party, and that third party assigned to the defendant, concluding in each case with a special traverse of the assignment to the defendant, as such pleas amount to special pleas of *nil habuit in tenebris*.—*Annis et al. v. Corbett*, 303.

Covenant against Encumbrances.] In an action on a covenant in a lease, that the defendant had not encumbered, charged or affected the premises leased in any manner, and assigning as a breach that A. and B., claiming under the defendant prior to the plaintiff's lease, and having a right to certain fixtures on the leased premises from the defendant, would have entered to remove them if the plaintiff had not paid them for them, the defendant pleaded first, that A. and B.'s title had expired before the said time when, &c., and that they had no right at the time alleged to

the fixtures, &c., concluding to the country: and secondly, that before the lease to the plaintiff, the defendant had leased the same premises for five years to C., who had a right under the lease to the fixtures, which were trade fixtures, that C. assigned to A. and B., who claimed these fixtures as trade fixtures: On special demurrer by the plaintiff to these pleas, the court held the first good, and the second bad.—*Cameron v. Tarratt*, 312.

LEAVE AND LICENSE.

Revocation of.] Where the sheriff had seized goods under a *f. i. fa.*, and allowed them to remain on the defendant's premises, on the understanding that they should be sold there on a future day, if the money were not sooner paid, the license thus given to enter on the premises and sell the goods accordingly, cannot be revoked by the defendant.—*McGillis v. McMartin, Sheriff, &c.*, 145.

LIBEL.

Privileged Communication.] An action for a libel contained in communications made to the executive government, with a view to obtain redress, cannot be sustained, unless it can be proved that the party making them acted maliciously and without probable cause.—*Rogers v. Spalding*, 258.

LIMITATIONS, STATUTE OF.

Question for Jury.] Where to a plea of *non assumpsit infra sex annos* a plaintiff replies, the residence of the defendant beyond the jurisdiction of the court at the time the action accrued, and a commencement of the action within six years after a return, the sufficiency of proof of these facts is a question for the decision of the jury, and not a ground of nonsuit.—*Johnson v. Buchanan*, 171.

Admission by Executor.] An admission by an executor that a promissory note (barred by the Statute of Limitations) is due, coupled with a statement that it could not be paid for want of assets, and that if there were assets it should be paid, is a conditional promise merely, and not sufficient to take the case out of the statute.—*Lampman et al., Executors of Lampman, v. Davis et al., Executors of Davis*, 179.

A plea of the Statute of Limitations, concluding to the country, is bad.—*Baldwin & Sullivan v. McLean*, 222.

Exception in Statute, Action of Account.] The exception in the Statute of Limitations, extends only to actions of account, not to actions of assumpsit on open accounts.—*Russell et al. v. Robertson*, 235.

Nature of Admission of Debt.] A statement by a party, upon being presented with an account and payment demanded, "That he was satisfied the amount had been paid to the plaintiff's agent, that the agent had been in the habit of having large transactions with him, and was more frequently in his debt than otherwise, but that he could not say how the matter stood, as he had not his books to refer to," held not to be sufficient to take the case out of the Statute of Limitations.—*McCormack v. Berzcy*, 388.

Absence from the Province. Husband and Wife.] Where in an action by husband and wife, on a contract made with the wife before marriage, the defendant pleaded the Statute of Limitations, to which the plaintiffs replied absence beyond the seas, and that they had never come into this province, upon which the defendant took issue, and upon the trial it was proved that the wife had never been in this province, and it appeared she had been married in

Scotland, the court refused to allow a nonsuit to be entered on leave reserved, on the ground that it had not been shewn that the husband never was in the province.—*Greig et Ux v. Baird*, 472.

LIMIT BOND.

What constitutes Breach of.] Semble: That a bond to the limits is not broken where the debtor has not wilfully withdrawn from the limits, but has been misled as to their extent, and gone beyond them without any idea that he was transgressing.—*Lewis v. Grant*, 290.

MAGISTRATE.

Trespass. Verbal Order to arrest.] Quære: Would a complaint against A. B., that he "was seen in the act of destroying or injuring private property," without alleging that the property belonged to another person, or that the act was wilfully or maliciously done, authorise a warrant as for a malicious injury to property, under 4 & 5 Vic. ch. 26? Where a magistrate allows a prisoner to depart, without examining into the charges against him, with a direction to appear next morning at the police office; and in the meantime, on the ground that he was assaulted by the prisoner when in custody before him, gives a verbal order to a constable to apprehend him and take him to the station-house or gaol, such imprisonment is illegal, and the magistrate cannot justify the arrest.—*Powell v. Williamson*, 154.

MANDAMUS.

Sufficient return.] Where the treasurer of the district council refuses to pay the account of the clerk of the peace, for certain services, and returns to a writ of mandamus nisi, that such charges are not shewn by the clerk of the peace to be connected with the administration of

justice, or to have been specifically provided for by law, so as to render it necessary that they should be audited by the district council; and returns, further, that there were no funds in his hands out of which he could pay those charges; the return was allowed.—*In re Clerk of the Peace v. Western District Municipal Council*, 162.

Turnpike Commissioners.] Where proceedings have been taken, and damages awarded, under the provincial act 4 & 5 Vic. ch. 63, the Court of Queen's Bench will not order the proceedings shewn on the return to a writ of certiorari to be quashed, on the ground of mere informality: to set them aside, the court must see that substantial justice between the parties has not been done.—*In re Denison v. H. Dist. Turnpike Trust*, 193.

District Treasurer.] A mandamus to the treasurer of a district to pay a sheriff's account, audited by the justices of the peace of his district in quarter sessions, was refused by the court; and the sheriff was left to his remedy against the treasurer, by indictment for breach of duty.—*In re Hamilton, Sheriff, v. Harris, Treasurer of London District*, 513.

MASTER AND SERVANT.

Action for Wages on Dismissal.] A declaration setting out a contract to pay a certain sum per year for services as long as a party should remain in such service, and a readiness and willingness to continue, will not entitle a party to recover for a wrongful turning away, unless the declaration plainly and directly alleges that the defendant did agree to retain the plaintiff in his service for the period within which he is stated to have been dismissed.—*Raines v. The Credit Harbour Company*, 174.

Child against Parent.] Unless a specific contract of hiring be proved,

the court will discountenance the bringing of an action by a son or daughter against a parent, for services performed while living in the parent's house.—*Sprague et Ux. v. Nickerson*, 284.

MESNE PROFITS.

Estopel by Judgment against Casual Ejector.] A judgment in ejectment against the casual ejector, does not estop a defendant in an action for mesne profits, from disputing the title of the plaintiff from the time of the demise laid in the action of ejectment.—*Ponton v. Daly*, 187.

MONEY HAD AND RECEIVED.

Where the plaintiff's agent had paid into an agency of the Gore Bank at Simcoe, a sum of money, partly in cash and partly by cheque on the Commercial Bank at Toronto, to be placed to the credit of the plaintiff with the Gore Bank at Hamilton, and the agent at Simcoe took upon the whole sum the usual commission of a quarter per cent. for transmission, but the cheque was lost in being sent from Hamilton to Toronto, and was never paid by the Commercial Bank or credited to the plaintiff. It was held that the plaintiff could not maintain an action against the Gore Bank for the amount of the cheque, as so much money had and received to his use.—*Todd v. The Gore Bank*, 40.

Where the plaintiff had been employed by A. in getting out timber, which A. afterwards sold to the defendant, who agreed verbally with the plaintiff and others, who had been working with him, the timber being in their possession, that he would pay the wages of the plaintiff and the others, if they would assist in rafting the timber to Quebec, out of the proceeds of its sale there: Held, that on shewing the sale there, the plaintiff was entitled to recover for his wages

as money had and received; and that the case was not within the Statute of Frauds.—*McDonald v. Cook*, 542.

MORTGAGE.

Witness.] In ejectment by a mortgagee, his mortgagor is a good witness to prove the mortgage void for usury, if the defendant or tenant does not hold under him.—*Doe dem. Mason v. Ballard et al.*, 2.

Usury in Debt, for which Mortgage given.] A. gave his note for a debt justly due by him, untainted with usury, which note was indorsed by B. to C., upon usurious terms, and A. afterwards makes a mortgage to C., to secure the amount payable by the note with interest: Held, that, although the mortgage was given only to secure what A. was legally liable to in the first instance, as maker of the note, yet C. could not recover upon it, because he had taken it to secure the debt arising from his usurious discount of the note.—*Chamberlin v. Chambers*, 126.

Stay of Proceedings on Payment of Mortgage Money.] In ejectment on a mortgage, the court will not order the proceedings to be stayed, and a re-conveyance made under 7 Geo. II. ch. 20, on payment into court, by the defendant, of the money due upon the bond and mortgage, together with the costs in the action, where the whole amount secured by the mortgage is not admitted to be due; nor will a reference to the master be ordered, to ascertain the amount actually due in such a case.—*Doe dem. McKenzie et al. v. Rutherford*, 172.

Ejectment by Mortgagor against a Stranger.] An action of ejectment cannot be sustained by a mortgagor, to recover possession of the mortgaged premises against a stranger, where the mortgage is overdue and unsatisfied, the fee and right to possession being in the mortgagee. The

court will not grant a new trial to enable a mortgagor, being lessor of the plaintiff in ejectment, to shew his own deed void for usury, and thus eject a stranger, who sets up as a defence a mortgage to a third party for the premises in question.—*Doe dem. McBemie v. Lundy*, 186.

NEW TRIAL.

Conflicting Evidence.] Where, in an action on a promissory note, the defence was forgery, and a number of witnesses were examined on both sides, and much conflicting testimony given, and the jury found for the plaintiffs, a new trial was refused, although the defendant positively denied the signature on affidavit, and produced numerous affidavits of parties who stated their belief that the signature was not his.—*Com. Bank, Midland District v. Denison*, 13.

Promissory Note. Forgery.] Where in an action against the indorser of a promissory note, and a defence of forgery, there was strong evidence that the defendant had admitted the indorsement to be his, or to have been made by his authority, whether the signature was genuine or not, and it was doubtful whether the jury had not been led to believe that the sole question for them was, whether the signature was the defendant's or not, and they found a verdict for the defendant, a new trial was granted on payment of costs.—*Bank Upper Canada v. Rogers*, 23.

Perverse Verdict.] Where a jury perversely give a verdict contrary to law and evidence, a new trial will be granted, although three verdicts have been before given in the same way.—*Kerby v. Lewis et al.*, 66.

Not grantable as of Extreme Right merely.] New trials will not be granted upon the extreme right of the party merely, but only to advance the substantial ends of justice.—*Brown v. Street*, 124.

Motion by Plaintiff after Verdict in his Favour.] A new trial will not be granted to a plaintiff in order to enable him to add to his verdict a trifling sum which he says was improperly allowed as a set-off to his claim on the first trial.—*Playter v. Taylor*, 159.

Surprise, where Defence pleaded.] Where in an action on a promissory note, by payee against maker, the defendant places upon the record special matter in defence, and upon a trial proves such special matter, and obtains a verdict, the court will not grant a new trial on an affidavit by the plaintiff that he had no idea that the defendant really intended to set up such a defence, but supposed that it was pleaded merely to gain time, and therefore did not prepare to meet it, and likewise of his ability to meet such defence on another trial.—*Prout v. Pollard*, 170.

Perverse Verdict.] The court will grant repeated new trials where verdicts are rendered contrary to law and evidence, especially in cases affecting continuing rights.—*Kirby v. Lewis et al.*, 285.

Misdirection.] If a judge misdirect a jury, the court will not necessarily grant a new trial for the misdirection, if they be satisfied that justice has been done between the parties notwithstanding the misdirection.—*Connell et al. v. Cheney*, 307.

On payment of Costs. Effect of Non-payment.] When a new trial is ordered on payment of costs, the party to whom the indulgence is granted, must attend promptly to their taxation and payment; and if he suffer so long a time to elapse that the plaintiff cannot proceed to trial at the next assizes, without embarrassment, the court will not, after the plaintiff has obtained a rule to enter judgment, discharge that rule, and allow the defendant the benefit

of his rule for a new trial.—*Johnson v. Sparrow*, 396.

Special Circumstances.] Where a verdict was taken for the plaintiff in an undefended cause, and no application was made to put off the trial, the court nevertheless granted a new trial on an affidavit of merits, and special affidavit of circumstances.—*Lockhart v. Milne*, 444.

Election of Nonsuit.] Where a plaintiff elects to be nonsuited, rather than go to the jury on the charge of the judge, he cannot afterwards move to set the nonsuit aside.—*Stuart q. t. v. Bullen*, 451.

Case for Seduction. Costs.] In an action for seduction, the court refused a new trial where there was much conflicting testimony, and the verdict was in favour of the plaintiff for £100, though the judge who tried the cause was unfavourable to that verdict; but the rule for a new trial was discharged *without costs*, as the plaintiff had improperly written letters to the court on the subject of the suit.—*Thorpe v. Grier*, 528.

NEW YORK CURRENCY.

Dollars and cents are not New York currency within the meaning of the provincial statute.—*Phinny et al. v. Stevenson*, 428.

NOTARY.

Semblé: A notarial protest from Lower Canada, certified by the notary as a true copy from his notarial book, is sufficient without any notarial seal.—*Ross and McLeod v. McKindsay*, 507.

PARLIAMENT.

Proceedings against Members of.] In an action against a person having privilege of parliament, the declaration will not be set aside for a variance between it and the original bill in a material allegation.—*Hill v. McNab and Boulton*, 413.

PARTITION.

Consent of Parties.] The court cannot award a writ of partition under 2 Will. IV. ch. 35, where all the parties interested in the partition consent to its being made.—*In re Eastwood et al.*, 3.

Demurrer to Petition.] The respondent to a petition for partition, under 3 Will. IV. ch. 2, may demur to the petition.—*Cronk et al. v. Cronk*, 471.

Consent of Parties.] The provisions of the statute 2 Will. IV. ch. 35, as to issuing writs for partition, do not apply to cases where the parties consent to a partition.—*In re Samuel Usher*, 527.

PARTNERSHIP.

Promissory Note.] One of several partners cannot bind the firm, by a bill drawn in his own name, though for partnership purposes; and sensible, that a seal is not necessary to a notarial protest.—*Goldie v. Maxwell*, 424.

PAYMENT.

Reduction of Damages under Plea of.] Where payment is pleaded under the rule of court which directs that all payments shall be specially pleaded, the party pleading payment of a larger sum is not thereby prevented from giving evidence of payment of a smaller sum, in reduction of damages, although the issue on the plea must be found against him.—*Gooderham, Assignee of Sheriff of District of Gore v. Chalmers et al.*, 172.

Appropriation of.] Although it is the general rule in the appropriation of payments, where there are two distinct claims to which they can be applied, that the creditor can at any time make appropriation, when the debtor has not directed the money to be specifically applied, yet, under

special circumstances, the law will sometimes make the appropriation, and take the option out of the hands of the creditor.—*Cummings v. Glassup et al.*, 364.

PLEADING.

Libel, Justification.] In case for a libel charging the plaintiff with being a "convicted felon," a plea that in a memorial to the Lieutenant Governor he had confessed that he had been found guilty of bigamy, is bad, as an argumentative and insufficient way of pleading a justification.—*Longworth v. Hyndman*, 17.

Slander, Inuendo.] Where in case for slander, the declaration alleged that one A. B. had been murdered, and that the defendant had said to the plaintiff of the deceased, "that boy, who is now lying a lifeless corpse on that floor, you have been the cause of his murder, and his blood lies upon your head," meaning thereby that the plaintiff had feloniously murdered the said A. B., and the defendant demurred, because the inuendo was unwarranted by the charge, the court held the declaration good, because it was for the jury to determine whether the words charged were spoken in the sense imputed to them.—*Jackson v. McDonald*, 19.

Special Traverse. Surrender of Tenancy.] A special traverse since the new rules, though pleaded in an action in which the declaration had been filed at a time when it would not have been affected by their operation, must conclude to the country, and not with a verification. And where in trespass for taking goods, the defendant having justified under a distress for rent, the plaintiff replied a new lease, by which the demise under which the distress had been made was surrendered and determined by operation of law, and

the defendant rejoined specially, traversing the surrender, it was held that the special traverse was bad, as it was of a matter of law.—Strathy v. Crooks, 44.

Trespass. *Plea of Property.*] In trespass for taking goods, a plea that at the time when &c., the goods were the goods of the defendant, and not of the plaintiff, is good, but it ought to conclude to the country, and not with a verification.—Cargill v. Flint, 49.

Special Agreement. *Plea amounting to General Issue.*] An agreement made to tow plaintiff's schooner when requested, without stating such agreement to be limited in its duration, and breach assigned in not towing in the year 1843; plea, that the agreement was made only to be in force for the year 1842, and no longer, and that the defendants towed at all times in that year when requested:—Whether such plea is bad, as amounting to the general issue.—Bunnell v. Crane et al., 116.

Mistake in Name of Arbitrator.] The effect of a repugnancy in a replication setting out an award to the submission set out on oyer, as regards the name of the arbitrator.—Tewsley v. Dunlop and Dunlop, 138.

Promissory Note. *Consideration.*] Where a defendant, sued as acceptor of a bill, pleads that after the acceptance by him and upon the action brought, plaintiff endorsed and delivered the bill, upon a good consideration, to a person whose name is unknown to the defendant, and plaintiff replies that at the commencement of the action he was and still is the holder of the said bill, not denying expressly the fact pleaded of his having indorsed the bill for a good consideration: the replication was held bad on demurrer.—Morton v. Thompson, 178.

Common Assumpsit. *Denial of*

Request.] To an action on common counts, for board, &c., found for defendant's illegitimate child, at defendant's *request*, alleging a subsequent promise of defendant to pay, &c., defendant pleads a denial of the *request*. The plea is bad, as resting the defence on an immaterial point; the promise should have been denied.—Flaherty v. Mairs, 221.

Bond. *Non Damnificatus.*] Non damnificatus is no answer to a declaration on a bond containing specific conditions. In an action against a sheriff on a limit bond, it is not necessary to shew that the sheriff has actually sustained a pecuniary damage.—Kingsmill, Sheriff, v. Gardiner et al., 223.

Covenant. *Demand of Performance.* *Averment of Time.*] Plaintiff declares on a covenant by defendant to transfer to him certain land, to which defendant was entitled as the son of an U. E. Loyalist, provided plaintiff, his heirs or assigns, should locate the land, perform settlement duties, and procure the patent thereof at his or their costs, defendant in his covenant agreeing to furnish plaintiff, his heirs or assigns, with full power and authority so to do; and then assigns as a breach, that from the time of the agreement to the commencement of the action, he (the plaintiff) has been *ready and willing* to locate, &c. &c. of which defendant had *due notice*, and *though often requested*, refused to furnish the plaintiff with power and authority so to do. The breach is bad, in not averring a *demand* of authority to locate, perform settlement duties, &c., with time and place.—Detlor v. Keogh, 226.

Bond Breach.] Plaintiff sues on a bond, sets out the condition, and alleges a breach, but not a breach of the *condition*. The declaration is bad.—Crysler v. Eligh, 227.

Misjoinder.] One count, in a declaration for slander, states a cause of action accruing to plaintiffs as partners, by reason of its being an injury to them in their joint business; other counts in the same declaration charge defendant with imputing forgery to plaintiffs as partners, &c.; the imputation of forgery not being a partnership imputation, the declaration is bad for misjoinder of counts. Words alleged to have been spoken cannot be amplified in their meaning by unwarranted inuendoes.—Morley et al. v. Nichols, 235.

Special Agreement. Plea of another Agreement.] Where the conditions of a sale are stated in the declaration as being imposed *at the time of sale*, the defendant cannot be discharged from his obligation to perform them, by alleging in his plea any agreement *before the sale*. The plea containing such a defence is bad on general demurrer.—Mead et al. v. Hendry, 238.

Several Pleas.] Under the rule prohibiting the use of several *pleas*, &c., founded on one and the same principal matter, a judge has power to strike out any such pleas. The rule which declares that several *counts* varying merely in the statement of the same subject-matter of complaint shall not be allowed, has reference merely to the taxation of costs, and does not forbid the use of them.—Johnson v. Hunter, 280.

Statement of Judgment and Writ in Justification in Trespass.] A plea of justification under a writ of *f. fa.* in trespass for taking goods, is bad, if it state the writ to have issued before judgment was entered. Since the New Rules, which require the judgment to be entered of a particular day, the issuing of the writ upon it should be averred of the day it actually issued, with the statement “*tested of*” the day in term on which

it is tested.—Dougall v. Moodie, Sheriff, 374.

Excuse of Profert.] It is not sufficient to excuse the profert of a deed, to allege that it is in the possession of a third party, who refuses to produce it, or deliver it to the plaintiff.—Brown v. Robertson, 379.

Accord and Satisfaction.] Where in an action against the maker of a promissory note, he pleaded that he made another note to the plaintiff for a larger sum, which the plaintiff accepted in full satisfaction (*among other things*) of the note declared on, and the plaintiff replied (admitting the making and delivery of the second note), that the defendant did not deliver, and he did not accept the same, “in full satisfaction and discharge of the note declared on, (*amongst other things*,”) as by the defendant alleged. The replication was held good on special demurrer.—Dee v. Cavanagh, 380.

Slander. Traverse of Inducement.] Where in case for slander of the plaintiff in his office of treasurer of the Ottawa District, he stated as inducement that it was his duty to return to the government a correct account on oath of all sums received by him from collectors for assessments, and averred that the defendant alleged that he had perjured himself with respect to such statement, and the defendant pleaded negativing the inducement only, the plea was held bad, on special demurrer, as tendering an immaterial issue.—Johnston v. McDonald, 384.

Venue. Amendment by Plaintiff.] After the venue has been changed at the instance of the defendant, the court will not, unless under very special circumstances, allow the plaintiff to amend his declaration, so as to bring it back to the district where it was originally laid.—Smith v. Cotton, 397.

Frivolous Demurrer.] Where in a declaration on a bill of exchange, an indorsement was alleged to — Laurie, and — Burns, trading under the name of Laurie & Burns, who indorsed to the plaintiffs, and the defendant demurred specially because the christian names of Laurie and Burns were not set out, the demur-
rer was set aside as frivolous.—Bank of Montreal v. Hopkirk, 418.

*Promissory Note. Notice. Guar-
antee.]* In a declaration against the drawer of a bill, notice of dis-
honour must be averred ; and if to excuse such notice, want of effects be averred, it must be shewn that there were no effects from the time of drawing the bill ; and notice must also be averred where the defendant is only a guarantee for the bill ; and a replication, to a plea stating that a bill of exchange had been taken in "full satisfaction and at all hazards" by the plaintiff, that the bill was dis-
honoured when due, is bad, on gene-
ral demurrer, as the plea is an answer to the action.—Goldie v. Maxwell, 425.

*Bond. Performance of Condi-
tion.]* Where to debt on bond, with a condition that the defendant should permit or cause certain goods to be forthcoming at a day of sale, when and wherever the plaintiff should appoint, the defendants pleaded that they did permit and cause them to be forthcoming at a day appointed, and the plaintiff replied that the defendants did not permit and cause them to be forthcoming at a particular place : the replication was held bad, the undertaking being in the alternative, and it being sufficient if the defendants permitted them to be forthcoming.—Miller v. Hamilton et al., 428.

Condition precedent.] Where the plaintiff covenanted that his son should serve the defendant for seven

years, in consideration whereof, the defendant covenanted at the expira-
tion of the time to convey two hundred acres of land to the son, his heirs and assigns : Held, that the service for seven years was a condition preced-
ent to the right to the conveyance of the land.—Goodall v. Elmsley, 457.

Trespass. Defect of Fences.] Where in trespass for seizing cattle, and causing them to be sold, the defendant pleaded that the cattle were taken damage feasant, and proceeded to justify the sale under 1 Vic. ch. 21, and the plaintiff replied, that the defendant's fences were defective, and that the cattle escaped from the highway into the close. Held, on demurrer to the replication, that it was bad for not stating that the cattle escaped through the defect in the fence, that the plea was good, as it shewed a sufficient justification of the seizure, the sale being merely matter of aggravation.—Stedman v. Wasley, 464.

Promissory Note. Argumentative Denial of Plaintiff's Title.] In assumpsit by the indorsee against the indorser of a bill of exchange, pro-
tested for non-acceptance, the defendant pleaded that before presentment for acceptance, the plaintiff had indorsed it to A. B., who from thence hitherto, had been, and still is, the holder thereof; and the plaintiff replied, admitting the indorsement to A. B., but averred that the plaintiff had afterwards been obliged to pay the amount to A. B., and had taken up the bill from him, and at the time of the commencement of the suit, was the true holder. The court held the replication bad as an argumentative denial of the defendant's plea.—Watkins v. Nicolls, 473.

Trespass. Time.] Where the plaintiff declared in trespass quare clausum fregit, laying the entry on the close under a videlicet on 10th

April, 1844, and on divers other days and times, and averred that during the time aforesaid, to wit, on the 10th of April, 1844, the defendant took and carried away divers goods and chattels (not averring them to belong to the plaintiff), and the defendant demurred specially, because the time of taking the goods was not laid with sufficient certainty: the court held the declaration good, and refused to entertain an objection on general demurrer, that it did not appear that the goods which were complained of as the subject of the seizure, were the goods of the plaintiff.—O'Brien v. Harahy, 475.

Trespass. Tenancy at Will.] Where in trespass quare clausum fregit, the defendant pleaded liberum tenementum, and the plaintiff replied that the defendant had leased the premises to the plaintiff *at will*, and that under the demise he entered and was possessed, until the defendant broke and entered, &c., the replication was held bad on general demurrer.—Henderson v. Harper, 481.

Promissory Note. Special Agreement on Assignment.] Where in assumpsit by the holder of a promissory note payable to A. B., or bearer on demand, the defendant pleaded an agreement between A. B. and himself at the time the note was made, that it should be held by A. B. as a security for the settlement of their future accounts, and that it was retained by A. B. after it was due, and that he then transferred it to the plaintiff, and that on settlement A. B. was largely indebted to the defendant; the plea was held bad, on general demurrer.—Harvey v. Geary, 483.

Trespass. Statement of Close.] To a declaration in trespass quare clausum fregit, setting out the close by metes and bounds, the defendant

pleaded that the part of the close on which the alleged trespass was committed, was his close, and the plaintiff replied that the close mentioned in the declaration was his close, and not the close of the defendant, as stated in the plea: the replication was held good on special demurrer.—Hiscock v. Cox, 489.

Bond. Departure.] To debt on an indemnity bond, the defendant pleaded non *damnificatus*, and the plaintiff having replied, showing how she was *damnified*, the defendant rejoined that the injury arose through the plaintiff's own fraudulent act. The rejoinder was held a departure, and bad on general demurrer.—Hamilton, Ex. v. Davis and Ford, 490.

PRACTICE.

Setting aside Proceedings for Irregularity, after Removal from Inferior Court.] Where proceedings in a court of inferior jurisdiction have been removed into Court of Queen's Bench, a rule nisi to set aside the proceedings had in such court, for irregularity, will be granted.—English v. Everett, 276.

Irregular Judgment on Cognovit.] A judgment entered on cognovit, without filing common bail, is irregular, and will be set aside with costs.—Goslin v. Tune, 277.

Judgment as in Case of a Nonsuit.] A cause is not at issue, and a rule for judgment as in case of a nonsuit, will not be granted, where the similiter is not filed. Semble—that where a plaintiff has been prevented by the defendant from proceeding to trial, a rule for judgment, as in case of a nonsuit, will be discharged, on the peremptory undertaking, without costs.—Doe dem. Anderson v. Todd et al. 279.

Judgment as in Case of a Nonsuit.] Semble, that when a plaintiff has

given notice of trial, a rule for judgment, as in case of a nonsuit, will be made absolute, even though the cause is not at issue, no similiter having been entered; unless that fact is shewn in answer to the rule—*Elvige v. Boynton*, 279.

Privilege of Parliament.] A member of the assembly is entitled to the privilege of being sued by bill and summons from the moment of his election; and a writ of *ca. re.* issued against him on the day of his election, is irregular.—*Mahon v. Ermatinger*, 334.

Replevin. Judgment as in Case of a Nonsuit.] A defendant in an action of replevin cannot move for judgment as in case of a nonsuit.—*Brown v. Simmons*, 336.

Setting aside Execution on Motion of Third Parties. Creditors.] Where there were several executions against the goods of a debtor, and there was a defect in the proceedings of the execution creditor, who was entitled to priority, which might have been sufficient to have set them aside on the motion of the debtor, the court refused to set them aside on the application of the subsequent execution creditors, made for the purpose of obtaining priority for their writs of execution, without the knowledge or consent of the debtor.—*Farr v. Arderly*, 337.

Cognovit Actionem. Motion for Irregularity. Form of Rule.] Where after action brought, a confession of judgment was prepared by the plaintiff's attorney, and sent to the plaintiff at his request, with a blank for the sum for which the confession was to be given, and the sum was filled in by the plaintiff, and the confession executed by the defendant, without the attorney or any of his clerks being present; it was held that the rule of court, Easter Term, 9 Geo. IV., requiring the intervention of a prac-

tising attorney for the taking of a confession of judgment, was sufficiently complied with. Any irregularity which is complained of as a ground for setting aside a proceeding, must be specifically pointed out in the rule, or so clearly referred to, as contained in the affidavits filed, as not to be mistaken.—*Thompson v. Zwick*, 338.

Interlocutory Judgment. Laches.] Where in a country cause, a short time before the assizes, an interlocutory judgment was set aside by a judge's order, on payment of costs, and that the defendant should plead issuably and take twenty four hours' notice of trial, and the defendant tendered the costs and pleas the evening before the first day of the assizes, at the same time serving a written demand of replication, and offering to take one hour's notice of trial, notwithstanding which the plaintiff, having previously given notice of assessment, went on and assessed damages, the court held the assessment regular, the defendant not shewing that his pleas were issuable, and the delay in his proceeding, after the order was granted, being too great.—*Jessup v. Fraser*, 390.

Service of Declaration. Laches.] Where a declaration was served before it was filed, and the defendant, being aware of the error, allowed interlocutory judgment to be signed, and notice of assessment given: Held, that he was too late to object to the irregularity.—*Proctor v. Young*, 391.

Several Defendants. Non Pros. for not delivering Particulars.] Where in an action of assumpsit against several, one of the defendants had obtained an order for particulars, which, after a lapse of several months, had not been delivered: the court discharged a rule nisi which he obtained for the delivering of particulars by a certain day, or that he should be at liberty

to sign judgment of non pros., on the plaintiff shewing that all the defendants had not appeared.—Shore et al. v. Bradley et al. 393.

Rule to enter Issue after Cause made a Remanet.] After a cause has been carried down to trial, and made a remanet, the defendant cannot rule the plaintiff to enter the issue, but the proper course is to take the cause down to trial by proviso.—Boulton v. Jarvis, 399.

Costs of the day.] Where no notice of trial had been given, the parties agreeing to try the cause by consent, the plaintiff entered the record for trial, and afterwards withdrew it. Held, that he was liable for the payment of the costs of the day, for not proceeding to trial.—Tenbroeck v. Cole, 401.

Irregularity. Style of Cause.] A rule nisi having been obtained to set aside a bailable writ and arrest thereon, for irregularity, the rule was discharged with costs, for a variance between the christian name of the plaintiff in the cause, and the name in the rule.—Hibbert v. Johnston, 403.

Irregularity, Statement of, in Rule.] Where a motion is made to set aside proceedings for irregularity, and the irregularity is mentioned specifically neither in the rule, nor in the affidavit on which it is moved, nor pointed out in the rule by reference to the grounds disclosed in the affidavit, the rule will be discharged.—Hamilton v. Howcutt, 403.

Time to plead. "Usual Terms."] Where the defendant obtained time to plead by judge's order, "on the usual terms," and the plaintiff, after pleas pleaded, took issue upon some and demurred to others, and the defendant obtained an order to amend his pleas or join in demurrer, with further time to rejoin "upon the

usual terms," and served both his orders, but afterwards, and within the time in which he would have been entitled to rejoin without any order for further time, filed a special demurrer to the plaintiff's replication, upon which the plaintiff signed interlocutory judgment: Held, that the interlocutory judgment was regular; the defendant being bound by his order for further time to rejoin, after having served it, and the special demurrer being in contravention of the understanding to rejoin upon the usual terms.—Strathy v. Crooks, 409.

Judgment as in Case of a Nonsuit.] A rule for judgment as in case of a nonsuit was refused, where, although notice of trial had been given, and countermanded, the similiter had never in fact been added; although the plaintiff had not proceeded to trial within two terms, according to the practice of the court.—Gibson v. Washington, 410.

Interlocutory Judgment. Form of Notice.] Where a plaintiff declared in assumpsit on several counts, and the defendants demurred to one count, and pleaded the general issue to the others, and the same term the plaintiff amended the count demurred to, and, two full days after the service of the amended declaration, signed interlocutory judgment on the whole record, and assessed damages, having first received notice from the defendants of an intended motion to set aside the judgment as signed *too soon*, the court would not afterwards allow the objection that the judgment to the whole declaration was wrong, as pleas were filed to part.—Bird v. Macaulay et al., 411.

Amendment of Rule.] Where a rule nisi to deprive a plaintiff of costs, under 49 Geo. III. ch. 4, was not correctly entitled in the cause, the court allowed an amendment, on payment of costs, by the affidavits filed.—Ball v. McKenzie, 412.

Peremptory Undertaking.] It is sufficient to entitle the plaintiff to enter into a peremptory undertaking, after default in not proceeding to trial, that it appears on affidavit, that on some special circumstances he withdrew the record, acting bona fide on counsel's opinion, without any statement of the circumstances.—*Armstrong v. Benjamin*, 414.

Irregularity, Pointing out in Rule.] Where the defendant moved to set aside the service of process, for irregularity in the notice to appear, but the irregularity complained of was neither pointed out in the rule, nor specified in the affidavits, the rule was discharged; but without costs, as it was a preliminary objection.—*Teller v. Wilson*, 417.

Judgment as in Case of a Nonsuit.] Where a plaintiff has given notice of trial and countermand, and afterwards not proceeded to trial according to the practice of the court, the defendant may obtain a rule for judgment as in case of a nonsuit, without any affidavit that issue was joined.—*Clute v. Badgely*, 417.

Setting aside Proceedings. Attorney not authorised to appear.] Where an attorney entered an appearance, and defended an action brought against two defendants, who had never been served with process, nor given him any authority to appear or defend for them, nor had any notice of the proceedings, until after a verdict had been rendered against them: the court set the proceedings aside, and ordered that the attorney should pay all the costs.—*Weir v. Harvey, Levitt, and Harvey, Junr.*, 430.

Judgment as in Case of a Nonsuit.] If a rule nisi for judgment, as in case of a nonsuit, for not proceeding to trial pursuant to notice, is discharged, upon a peremptory undertaking, and payment of the costs of the day, &c., the plaintiff can take no further step

towards proceeding to any future trial, unless those costs are first paid, and if he does proceed, as by giving notice of trial, the defendant may treat such notice as a nullity.—*Doe dem McMillan v. Brock*, 482.

Payment into Court.] According to the practice of this court, where a defendant pleads payment of money into court, it is not necessary to obtain the master's receipt for the money on the margin of the plea.—*Miles v. Harewood*, 515.

Judgment as in Case of a Nonsuit.] Where a rule for judgment as in case of a nonsuit has been discharged by the plaintiff on a peremptory undertaking and payment of costs, and he afterwards makes default both in proceeding to trial and in payment of those costs, the court will not, unless under very special circumstances, set aside a rule absolute which has been obtained by the defendant in consequence. It is not necessary that a rule absolute for judgment as in case of a nonsuit should be served.—*Matthewson v. Glass*, 516.

Judgment as in Case of a Nonsuit.] Judgment as in case of a nonsuit, cannot be obtained in a cause in which there are several pleas on which no issue has been joined, by adding similiter.—*McCague v. Clothier*, 517.

Points reserved. Entry of Judgment.] Where a verdict was rendered for the plaintiff, in ejectment, subject to points reserved, and without any argument of the points, the plaintiff entered judgment, and took possession of the land in dispute, the court refused to interfere and set the judgment aside, after a lapse of more than two years.—*Doe Myers v. Tolman*, 520.

PRINCIPAL AND AGENT.

A person receiving money from an agent, on a promise to return it to him, cannot, in an action by the agent

to recover it back, set up as a defence that the money really belongs to a third party.—*Lister v. Burnham*, 419.

PROCESS.

Service of, on Witness.] It is irregular to serve process on a witness while attending in court at nisi prius, under subpoena.—*Thompson v. Calder*, 403.

Irregularity. Testatum Writ.] It is not irregular to issue a testatum writ to the Home District, as upon an original writ to an outer district.—*Patterson et al. v. Calvin et al.*, 409.

Notice to Appear.] In a suit against several defendants, it is sufficient to address the notice to appear on each copy of the process, to that defendant alone, on whom the copy is served.—*The Bank of Montreal v. Edmunds et al.*, 411.

PROMISSORY NOTE.

Indorsee v. Accommodation Maker. Sum recoverable.] In an action by an indorsee of a promissory note against the maker, *de injuriâ* is a good replication to a plea of usury, between the indorser and the indorsee; but where the defendant pleaded as to part of the sum secured by the promissory note, that the maker made the note only for the accommodation of the payee, and that the indorsee gave only a certain sum for it, and that it was transferred to him to secure that sum; and the plaintiff replied that the note was given to him to secure that sum to be paid at a particular time, but that if it were not paid at that time the plaintiff was to hold the whole sum secured by the note: it was held that the replication was bad in substance, as the defendant, being only an accommodation maker, could not be charged with more than the plaintiff gave for the note.—*Strathy v. Nicholls*, 32.

Surety. Joint Maker.] One of the joint makers of a promissory note

cannot plead that he made the note, with the plaintiff's knowledge, only as a surety for the other maker, and that the plaintiff gave time to the other maker without his knowledge or consent, and that he was thereby discharged; and if such a plea were tenable, *de injuriâ* would be a good replication to it.—*Davidson v. Bartlett & Murney*, 50.

Notice of Non-payment, when payable in Lower Canada.] In an action on a promissory note drawn and payable in Lower Canada, the law of Lower Canada must govern in regard to the sufficiency of the notice of non-payment by the maker to charge the indorser.—*City Bank v. Ley*, 192.

Pleading. Defence inconsistent with Note.] A plea to a declaration on a promissory note setting up a parol agreement inconsistent with what the indorsement on the note imports, is bad.—*Hart et al. v. Davy*, 218.

Notice of Non-payment of Note payable in Lower Canada.] Where a bill is drawn and indorsed in Upper Canada, but made payable in Lower Canada, the law of Lower Canada is to govern the time within which notices of non-payment may be sent.—*Matthewson v. Peter Carman*, 259.

Want of Consideration.] To an action upon a promissory note, defendant pleads the non-performance by plaintiff of an alleged contract, to shew failure of consideration: Held, that such contract is not divisible, but must substantially be proved as laid. To the same note defendant pleads a set-off for goods sold and delivered, but evidence at the trial shews that the set-off is confined to the special contract for the sale and delivery of goods out of which the note has arisen: Held—that the goods so delivered could not form the subject-matter of a set-off, but the

plaintiff ought to have been sued on his special undertaking.—Matthewson v. Daniel Carman, 266.

Defence of higher Security.] Where a person having taken from his debtor a note of a third party indorsed by the debtor, as a security for a portion of his debt, takes afterwards a mortgage from his debtor for the whole sum due to him, appointing a day for payment more distant than that on which the note is to fall due, and with the usual covenant in the mortgage to pay the money: Held, that the remedy against the debtor, as indorser of the note, is extinguished by the taking the mortgage for the same debt,—there being no reference made in the mortgage to the note, as being an outstanding security for the same debt.—Matthewson v. Brouse, 272.

Merger. Higher Security.] Where in an action by the indorsee against the maker of a promissory note, the defendant pleaded that at the time the note was given, a mortgage was taken by the payee of the note, with a proviso for its payment according to the tenor of certain promissory notes, bearing even date therewith, payable to the payee, and that the note declared on was one of those promissory notes, and was indorsed to the plaintiff after it was due, the plea was held bad, as by the very terms of the mortgage, it was evidently taken as collateral security, and not in satisfaction, or as a merger of the promissory notes.—Murray v. Miller, 353.

Accord and Satisfaction.] Where in a action against the maker of a promissory note, he pleaded that he made another note to the plaintiff for a larger sum, which the plaintiff accepted in full satisfaction, (*among other things*), of the note declared on, and the plaintiff replied (admitting the making and delivery of the second note), that the defendant did

not deliver, and he did not accept the same "in full satisfaction and discharge of the note declared on, (*among other things*)," as by the defendant alleged. The replication was held good on special demurrer.—Dee v. Cavanagh, 380.

Several Indorsers. Notice.] Where a note is made payable to, and indorsed by several persons, in copartnership, notice to one is notice to all.—The Bank of Michigan v. Gray et al., 422.

Joint Action under 5 Will. IV., ch. 1.] Where in action against the maker and indorser of a promissory note, under 5 Will. IV., ch. 1, one defendant pleaded the general issue, and the other allowed judgment to go by default, and at the trial the plaintiff was nonsuited as to both,—no one being present in the court on his behalf, the nonsuit was set aside, on payment of costs.—Small v. Powell et al., 427.

Payable in Lower Canada. Protest of.] A promissory note made in Upper Canada, payable in Montreal in Lower Canada, is an inland note, being in effect payable generally under our statute 7 Will. IV. ch. 5, and may be properly protested on the day after the third day of grace.—Bradbury v. Doole, 442.

Part Failure of Consideration.] Where in an action on a promissory note, the defendant proved that the note was given by him to the plaintiff, on a sale of some hams, warranted good by the plaintiff; that a large sum of money was paid at the time, and the note given for the balance; that the hams were many of them worm-eaten, and utterly useless, and that the money paid was equal to the value of all the hams, and the jury found a verdict for the defendant, on the ground that the hams were not worth more than the money paid, on a direction by the presiding judge that such finding would be a defence. The

court held that the partial failure was no defence to the action on the note, without evidence of fraud, and a new trial was granted without costs.—*Kellogg v. Hyatt*, 445.

Proof of Consideration.] Where in an action on a promissory note, payable to the order of A., it was proved that B. indorsed it, and then brought it to A., who indorsed it merely for accommodation, never having received any value for it; the court held, that want of consideration could not, on those facts, be inferred, as between the maker and B.; and that the plaintiff was not obliged to prove the consideration.—*Mair v. McLean*, 455.

Payment.] Where in assumpsit for goods sold, the defendant pleaded that he had made his note to the plaintiffs for part, and paid the note when due, ; and the plaintiffs replied, that when the note became due, the defendant only paid part, to wit, £93 in money, and gave an acceptance on A. B. for the residue, £50, which was dishonoured when due, of which due notice was given, concluding with a special traverse, and the defendant reiterated the defence in the plea : Held, that he could not on the trial shew that the plaintiffs had made the £50 acceptance their own through laches, but under the pleadings was bound to shew actual payment.—*Ross & McLeod v. McKindsay*, 507.

Account Stated.] A promissory note is *prima facie* evidence of a settlement of accounts, between the maker and the payee, up to the time of giving it.—*Mitchell v. Jennings*, 537.

PUBLIC DOCUMENT.

Evidence.] Any public document, filed in a public office of the government, may be proved by an examined copy.—*McLean v. McDonell*, 13.

QUEEN'S COUNSEL.

A patent from the crown, appointing a barrister a Queen's counsel,

directed that he should take precedence next after another Queen's counsel, who was subsequently appointed attorney general: Held, that such patent did not, then, entitle him to precedence before the solicitor general.—*In re H. J. Boulton, Q. C.*, 317.

REGISTRY ACT.

The certificate of registry, indorsed on a deed, under 35 Geo. III. ch. 5, sec. 5, is *prima facie* evidence only of registry, and is not to be taken as incontrovertible evidence of the fact of registry, so as to exclude all proof to the contrary.—*Doe dem. McLean v. Manahan*, 491.

REPLEVIN.

Judgment as in Case of a Nonsuit.] A defendant in an action of replevin, cannot move for judgment as in case of a nonsuit.—*Brown v. Simmons*, 336.

Form of Declaration on Bond.] In a declaration by the assignee of a replevin bond, it is bad, on general demurrer, to declare in the form used in England, with an averment of a plaint made to the sheriff.—*Hutt v. Keith*, 478.

Staying Proceedings on Bond.] Where, after proceedings have been commenced on a replevin bond, the parties to the replevin go to arbitration without the consent of the surety, all further proceedings against the surety will be stayed: *Aliter*, where the reference to arbitration takes place with his consent.—*Hutt v. Gilleland*; *Hutt v. Keith*, 540.

REVENUE.

Where a claim for goods seized for an alleged infraction of the revenue laws was brought before the commissioners of customs, under provincial statute 4 Geo. IV., ch. 11, and the commissioners upheld the claim, and restored the property to the claimant, *without any trial or verdict passing*

upon the matter, but gave a certificate to the officer of customs, who had seized, that there was a probable cause of seizure; such certificate, however, not being entered of record in any way: Held, in an action of trespass against the officer for the seizure, that the certificate afforded him no protection, either under the provincial statute 4 Geo. IV. ch. 11, sec. 27, or the imperial statute 3 & 4 Will. IV. ch. 59, sec. 72.—Lewis v. Kirby, 486.

SET OFF.

To an action of assumpsit on the common counts, against an executor on his testator's promise, defendant pleads a set-off, due to him from plaintiff, for goods sold, money paid, by defendant, as executor of the testator, to plaintiff. The plea is bad, defendant attempting to set off an individual debt against a demand due from him, in his capacity of executor.—Glacey v. Wilson, Executor, 237.

Nature of. Waiver of Delay in Delivering of Particulars of.] Where a defendant pays for plaintiff orders in favour of third parties, such payments may be given in evidence as items under a set-off, and need not, in order to their admission in evidence, be pleaded as payment on account; and where a defendant delivers his particulars of set-off on a day later than that appointed by a judge's order, and the plaintiff's attorney (through his clerk) accepts the particulars, keeps possession of them, and gives no notice of his refusing to receive them, *as not in time*, such conduct is a waiver of all objections, on the ground of delay, to defendant's right to go into evidence of his set-off.—McLellan, Executor, &c., v. McManus, 271.

One of several Defendants. Judgment.] One of several defendants in a cause, against all of whom a verdict had been recovered, was allowed,

on summary application after judgment, to set off the amount of a judgment which he had recovered against the plaintiff, against the plaintiff's judgment against him and his co-defendants, saving to the attorney his lien for costs.—Fortune v. Hickson, et al., 408.

SHERIFF.

License to Remove Goods Seized in Execution, Revocation of.] Where the sheriff had seized goods under a fi. fa., and allowed them to remain on the defendant's premises, on the understanding that they should be sold there on a future day, if the money were not sooner paid, the license thus given to enter on the premises, and sell the goods accordingly, cannot be revoked by the defendant.—McGillis v. McMartin, Sheriff, &c., 145.

Delivery of Goods on Bond to Execution Debtor.] Where a party, whose goods are seized under a fieri facias, gives bond to deliver them up to the sheriff on request: Held, that the effect of that condition is merely that they shall be forthcoming when demanded, and that the sheriff cannot insist on the parties removing them to any particular place within the district; and where, in such a case, the obligor had once delivered up the goods to the sheriff, the condition is performed; and, if they are left in his hands, his refusing to give them up on a subsequent occasion, cannot be set up as a breach of the condition.—Malloch, Sheriff of Dalhousie, v. Patterson, 261.

Sale of Lands by new Sheriff after Seizure by old Sheriff.] Quære: Under what circumstances the old sheriff, or his late deputy, may proceed to sell lands which had been advertised under a writ of fi. fa. before the new sheriff came into office:—Campbell v. Clench, 267.

Covenant against Sureties.] In covenant against a sheriff's sureties, the breaches assigned were, first, that the sheriff did not arrest the debtor in the original action on a causa remitted to him, but falsely returned non est inventus; and, secondly, that he arrested him, and afterwards allowed him to escape. The defendants pleaded to first breach, that the sheriff did not falsely and deceitfully return that the debtor was not found in his district; and, to the second, that the gaol was accidentally destroyed by fire, and so the debtor escaped. Both pleas were held bad: the first, as containing a negative pregnant; and the second, for not denying that the fire occurred through the negligence or default of the sheriff or his deputy.—*Corkery v. Graham et al.*, 315.

Trespass. Fraudulent Sale.] Where to trespass de bonis asportatis against a sheriff, he justified under a writ of execution, and alleged that the goods in question had been fraudulently sold and delivered to the plaintiffs by the debtor, to defeat the execution, the plea was held bad, because it did not shew the judgment upon which the execution issued.—*Adams et al. v. Kingsmill*, 355.

Trover by Tenant in Common for Sale of Goods in Execution.] A tenant in common of goods, which have been sold under an execution against his co-tenant, as such co-tenant's absolute property, cannot maintain trover against the sheriff who sold them, to recover the value of his share or interest in them.—*Ecclestone v. Jarvis, Sheriff*, 370.

Out of Office. Rule to return Writ.] An attachment will not be granted against a sheriff, for not returning a writ, when he has been out of office for more than six months before the rule to return the writ issued.—*Mott v. Gray et al.*, 392.

Rule to return Writ.] Where, after the delivery to a sheriff of a writ of execution against lands, the plaintiff and defendant agreed to compromise, and after a delay of more than two years the compromise was not effected, and the plaintiff obtained a rule for an attachment against the sheriff for not returning the writ: the court set the rule aside.—*Crooks v. O'Grady*, 400.

Rule to return Writ. Disputed Property in Goods.] It is no sufficient ground for opposing a rule for an attachment for not returning a writ of execution against goods, that there is a question depending before the court, respecting the title to those goods. The sheriff should, in such a case, apply to have the time extended for making his return, until the question of property is decided.—*Stull v. McLeod*, 402.

Return of Writ.] Where a sheriff, on being ruled to return a writ of execution, returned it by post to the Crown Office, but without paying the postage, for which reason it was not filed in the Crown Office, and the plaintiff, with notice of these facts, obtained a rule for attachment on the usual affidavit of search, the court set the attachment aside; but only on payment of costs, as the sheriff was bound to have paid the postage to make his return effectual.—*The Queen v. Moodie, Sheriff*, 410.

Fees on Execution.] Where after a seizure in execution, the parties settle, the plaintiff may apply to the court to fix the amount of the sheriff's fees, but he will not be allowed the costs of the rule, even though no cause is shewn against it.—*In re Home Sheriff*, 412.

Return of Writ.] The court will, on special circumstances, relieve a Sheriff, by allowing the return of a writ, even after a motion has been made to bring in his body on the

coroner's return of *cepi corpus*, to the attachment issued against the sheriff, for not returning the writ.—*The Queen v. Jarvis, sheriff, in re Spencer v. Silverthorn*, 415.

Covenant of surety.] In an action by a defendant in a writ of execution, against the sureties of a sheriff on their covenant, under the statute, for misconduct in the sheriff in the execution of the writ, it is not necessary that he should set forth in the declaration the judgment in the suit against himself: and it is a good breach of the covenant to shew that the sheriff sold the defendant's property for more than sufficient to satisfy the debt, and afterwards wrongfully resold it at a reduced price, causing a loss to the defendant of the difference.—*Sanderson v. Hamilton*, 460.

Covenant of Surety.] In an action against a sheriff for a false return, a plea that no writ of *fieri facias* issued upon the judgment according to law, is bad on special demurrer; and, to a declaration for a false return, alleging that the sheriff made the money, but returned that he had made fifteen pounds and no more, it is a bad plea that the sheriff did not seize nor levy any money, as he is concluded by his return as to fifteen pounds; but to an averment that the sheriff made all the money and did not pay it over, such a plea is good. It is also a good plea to a breach that the sheriff made the money on the writ, and did not pay it over, that the sheriff made a certain sum, which he paid over, and it is not necessary to shew to that breach, that the defendant had no goods whereof the residue could be made; although to such a breach it is a bad plea, that the sheriff was instructed to make a certain sum, and that he made that sum and no more, or that the writ was not returned as alleged in the declaration. And to an aver-

ment of a false return to a writ against the goods, &c. of two defendants, a plea that *they* had not any goods, is bad on special demurrer; it should deny that *either* of them had any goods.—*Upper v. Hamilton*, 467.

Covenant of Surety.] After the decease of a sheriff, the court will not stay proceedings in an action against his sureties on their covenant under statute 3 Will. IV. ch. 8, for a default committed by the sheriff in his life-time, until a recovery shall be had against the sheriff's representatives, nor will they direct in such case that the execution on the judgment against the sureties shall be endorsed first to levy of the property of the sheriff.—*Morris et al. v. Graham et al.*, 521.

Covenant of Surety.] The sureties of a sheriff are not liable under their covenant given in accordance with the terms of 3 Will. IV., ch. 8, as for wilful misconduct on the part of the sheriff, where the misconduct consists in a mere error in judgment in deciding *bona fide* upon the priority of writs of execution placed in his hands.—*Bradbury v. Adams et al.* 538.

SHIPPING.

Dangers of Navigation.] Where defendant had agreed to return a steamer, chartered by him, on a certain day, in good repair, "dangers by the lake excepted," it was determined that a plea "that before the day arrived the plaintiff took the boat from the defendant without his consent, and kept her," was a sufficient bar to the action, though the plea did not in express terms confess and avoid the fact of not returning the boat. Determined also, that damage to a steamer by an accidental fire, not occasioned by lightning, did not excuse the charterer for not returning the steamer in good repair, as it did not come under the exception of dangers of the lakes. *Quære*—Whether

a fire occurring in a steamer, from some cause clearly connected with the use of steam, and while the boat was navigating, would come within such exception.—*Larned v. McRae*, 99.

SLANDER.

Privileged Communication.] A complaint addressed to a public body, or to government, respecting the conduct of an officer, whose conduct the government or such public body may have the power of controlling, is not necessarily a privileged communication. That depends on the motives with which such communication is made.—*Corbett v. Jackson*, 128.

Perjury. Justification. The swearing falsely by a voter at an election of alderman or common-councilman, for the city of Toronto, that he is the person described in the list of voters entitled to vote, is not perjury by any express enactment; and a plea of justification to a declaration on the case for imputing perjury to plaintiff, on the ground of such false swearing, is bad on demurrer.—*Thomas v. Platt*, 217.

TENANT IN COMMON.

Trover against Sheriff.] A tenant in common of goods, which have been sold under an execution against his co-tenant, as such co-tenant's absolute property, cannot maintain trover against the sheriff who sold them, to recover the value of his share or interest in them.—*Ecclestone v. Jarvis, Sheriff*, 370.

TORONTO, CITY OF.

Dogs, Bye Law against.] The corporation of the city of Toronto have power, from time to time, at their discretion, to make bye-laws, by which dogs found running at large within the limits and liberties of the said city, after proclamation of such bye-laws, may be shot.—*McKenzie v. Campbell*, 241.

TRESPASS.

New Assignment after Justification.] The effect of a new assignment, where but one trespass has been complained of. Plaintiff must not in his replication amplify his cause of action for which he has declared; nor can he, in his replication, deny the justification wholly, and at the same time reply excess.—*Spalding v. Rogers et al.*, 135.

To Lands. Justification.] In trespass quare clausum fregit, the defendant pleaded that the plaintiff made his complaint to the justices of the peace of a forcible entry and detainer under the Statute, and the justices summoned a jury and heard the complaint, and made a warrant for restoring the plaintiff to his possession, and that this was the same trespass as that complained of by the plaintiff. The plea was held bad on general demurrer.—*Boulton v. Fitzgerald*, 343.

Plea of Property.] Where, in trespass de bonis asportatis, the defendant pleaded property in himself, giving the plaintiff color, and the plaintiff replied stating property in himself at the time of the trespass, by purchase from the defendant, the replication was held bad on special demurrer.—*Abrams v. Moon*, 377.

Description of Close.] Where in trespass quare clausum fregit, it appeared that the only injury complained of, and the only one in evidence before the jury, was, the destruction in part of a mill over the waters of a river, and not on the land included in the description of premises in the declaration: Held, that the verdict found for the plaintiff was incorrect, and a nonsuit was entered.—*Caniffe v. Caniffe et al.*, 551.

Title to Personality when Action brought.] Where in trespass for taking the plaintiff's cattle, the defendant

pleaded not possessed, and on the trial it was proved that the cattle had belonged to the defendant, and that the plaintiff had leased them with a farm from the defendant, but had detained them after the term had expired, for which the defendant had sued him and recovered damages to the value of the cattle, after this action was brought: Held, that the plaintiff could not treat this verdict as giving him a title to the cattle, by relation back, at the time this action was commenced, but that this defendant was entitled to succeed on his plea of not possessed.—*Abrams v. Moon*, 552.

TROVER.

Mortgagor. Fixtures.] The tenant of a mortgagor, holding under a lease for years, during the continuance of his term, attorned to the mortgagees, and after the term expired continued to hold the premises from the mortgagees as a yearly tenant, and when his tenancy ceased claimed from them certain shelves and boxes with which he had fitted up a shop on the premises during the continuance of his lease from the mortgagor, and which were not fixtures, and for which, upon the mortgagees' refusal to part with their possession, he brought trover: Held, that the action was maintainable.—*Denholm v. The Commercial Bank, M. D.*, 369.

USURY.

Variance in Time in stating Contract of Loan.] When in a plea of usury to an action on a promissory note, the defendant stated the usurious lending, and averred that it was on a promise to forbear for twelve months, from 28th October, 1842, until 28th October, 1843, and that the note was given payable in twelve months to secure the payment, and the plaintiff demurred because the note was not due, including the three

days of grace, until the 31st October, and therefore the contract was erroneously stated; the court held the plea sufficient, as the three days of grace were the act of the law, and not a part of the contract of the parties.—*McCrae v. Reynolds*, 36.

Nonsuit. New Trial.] Where in a qui tam action for usury, the plaintiff was nonsuited for not producing certain promissory notes in the negotiation of which the usury had taken place, the only evidence offered to account for their non-production having been a letter that they were not to be found in the office of the judge's clerk, where it was sworn they had been filed, the court refused to set aside the nonsuit, upon affidavit that they had been found since the trial.—*Root q. t. v. Woodward*, 311.

Variance in Time of Forbearing.] In a qui tam action for usury, any variance between the statement of the time of forbearance laid in the declaration, and the time proved, is fatal.—*Fraser q. t. v. Thompson*, 314.

Construction of 51 Geo. III. ch. 9, sec. 6.] Although by the words of the provincial statute 51 Geo. III. ch. 9, sec. 6, against usury, contracts, bonds, &c., are declared void only where usurious interest is reserved and taken; yet the court will construe "and" to be "or," particularly as the statute 7 Will. IV., ch. 5, sec. 3, declares in the preamble, "that by law all contracts and assurances whatever, for payment of money, made for an usurious consideration, are utterly void;" and, therefore, a plea to an action on a promissory note, that the note was given to secure a debt, and was for an usurious consideration for forbearance, was held good, although it did not state that the usurious interest was paid or received.—*Boag v. Lewis et al.*, 357.

Amendment of Declaration in Penal Action for.] Where, after verdict for

the plaintiff, and new trial granted for variance between the statement of the loan and forbearance as laid, and that proved in a *qui tam* action for usury, the plaintiff moved to amend his declaration, by making it correspond with the evidence at the trial, the court discharged the rule.—*Fraser q. t. v. Thompson*, 522.

VENDITIONI EXPONAS.

It is no defect in a writ of venditioni exponas against lands, that it has not three months between its teste and return.—*Landrum v. McMartin*, 394.

WITNESS.

Commission to examine before Issue.] A party may have a commission to examine a witness before issue joined, upon his undertaking not to act under it until the case is at issue.—*Dougal v. Moodie*, 257.

Promissory Note. Attorney.]—Where in an action against the indorsee of a promissory note, the defence was that the note had been stolen from one of the indorsers, and had been delivered to the plaintiffs, knowing it to have been stolen, and that they did not take it in good faith, and the plaintiff's attorney, by whom the note had been taken on their behalf, was offered as a witness at the trial, to prove the circum-

stances under which it was taken, but being objected to as responsible over to the plaintiffs, if the note had been taken through his negligence, was rejected. It was held that this rejection was improper, and that he was a good witness without a release.—*Bank of B. N. A. v. Holman, et al.* 309.

Clerk of Turnpike Commissioners.] The clerk to the commissioners of a turnpike trust, who is empowered to sue for tolls, under 3 Vic. ch. 36, is not a competent witness against the defendants in an action for the tolls, in which he is the nominal plaintiff.—*Cummings v. Glassup et al.*, 364.

Service of Process on.] It is irregular to serve process on a witness while attending in court at nisi prius under subpoena.—*Thompson v. Calder*, 403.

Stockholder in Bank.] Where a witness, who was a stockholder in, and also president of, a banking institution, stated in an action brought by the bank that he had released his stock, for a nominal consideration, to the directors, but that he had no doubt it would be restored to him, the court held that the transfer was merely colorable, and that his testimony was not admissible.—*The Bank of Michigan v. Gray et al.*, 422.

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